DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-479
Title: Kevin Abbott, Petitioner
v.
United States
Docketed: October 22, 2009
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-1623)
Decision Date: July 28, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 19 2009	Petition for a writ of certiorari filed. (Response due November 23, 2009)
Nov 20 2009	Order extending time to file response to petition to and including December 23, 2009.
Dec 22 2009	Memorandum of respondent United States filed.
Dec 31 2009	Reply of petitioner Kevin Abbott filed.
Jan 7 2010	DISTRIBUTED for Conference of January 22, 2010.
Jan 25 2010	Petition GRANTED. The petition for a writ of certiorari in No. 09-7073 is GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.
Mar 1 2010	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including April 30, 2010.
Mar 1 2010	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including April 30, 2010. VIDED.
Mar 1 2010	The time within which to file respondent's brief on the merits is extended to and including July 15, 2010. VIDED.
Apr 30 2010	Brief of petitioner Kevin Abbott filed. VIDED.
Apr 30 2010	Joint appendix filed. VIDED. (Statement of costs received.)
May 7 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
May 7 2010	Brief amicus curiae of Families Against Mandatory Minimums filed. VIDED.
May 7 2010	Brief amicus curiae of American Bar Association filed. VIDED.
Jul 15 2010	Brief of respondent United States filed. VIDED
Jul 19 2010	Joint motion for divided argument filed by petitioners. VIDED.
Jul 20 2010	SET FOR ARGUMENT ON Monday, October 4, 2010.
Jul 29 2010	CIRCULATED.
Aug 9 2010	Record received from U.S.C.A. for 3rd Circuit. (1 box)

Aug 10 2010	Record received from U.S.D.C. for Eastern District of Pennsylvania. (1 envelope)
Aug 16 2010	Reply of petitioner Kevin Abbott filed. (Distributed)
Sep 3 2010	Joint motion for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 7 2010	Justice Kagan is recused in this case.
Oct 4 2010	Argued. For petitioner in 09-7073: David L. Horan, Dallas, Tex. (Appointed by this Court.) For petitioner in 09-479: James E. Ryan, Charlottesville, Va. For respondent: Roy W. McLeese, Acting Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-479 OCT 19 2009

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No.

In the Supreme Court of the United States

KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Third Circuit, App., *infra*, 1a-24a, is reported at 574 F.3d 203. The district court's opinion, App., *infra*, 25a-31a, is available at 2008 WL 540737.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. Petitioner timely filed a petition for rehearing en banc, which was denied on August 31, 2009. App., *infra*, 32a-33a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 of the United States Code provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a

> firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.

Section 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

Section 922(g) provides, in pertinent part:

> It shall be unlawful for any person – (1) who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition.

STATEMENT

As amended in 1998, § 924(c) declares that the mandatory minimum sentences it authorizes for specified gun offenses do not apply when "a greater minimum sentence is otherwise provided * * * by any other provision of law." The courts of appeals have split deeply over what the language of this so-called "except" clause means. The Second Circuit has held that the clause renders the § 924(c) sentence inoperative whenever another provision of law

subjects the defendant to a longer minimum than the one § 924(c) would specify. See *United States* v. *Williams*, 558 F.3d 166 (2d Cir. 2009). Other circuits have held that the clause bars a § 924(c) sentence only when a defendant is subject to a longer mandatory minimum for a *firearm offense*. See pp. 11-15, *infra*. Those courts of appeals have, in turn, split over exactly what kinds of firearm offenses count. Some have held that any firearm offense can qualify; others have held that only violations of provisions exactly like § 924(c) suffice. In the decision below, the Third Circuit joined the Fourth and Fifth Circuits in holding that the term "any other provision of law" does not, in fact, refer to *any* provision of law currently found in the U.S. Code. Instead, the court below concluded, that clause addresses the possibility that Congress might in the future enact a law imposing a heavier minimum sentence for the precise offense described in § 924(c) itself but codify that punishment elsewhere. App., *infra*, at 12a. Only in such a case, the court held, would § 924(c) impose no additional, consecutive sentence.

The United States has acknowledged that "[t]he courts of appeals are divided on the meaning of the 'except' clause," Br. in Opp. at 9, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009), and that this is an "important and recurring issue." *Id.* at 7, 10. Accordingly, "[t]he Solicitor General has authorized the filing of a petition for certiorari," *id.* at 7, in another case concerning this provision. That case, however, poses only the first of the two questions this case presents. See Pet. for Reh'g En Banc at 1-2, *United States* v. *Williams*, 558 F.3d 166 (2d Cir.

2009) (No. 07-2436-cr); U.S. S. Ct. No. 09A247 (extending time for filing petition for a writ of certiorari to Oct. 20, 2009).

* * * * *

Petitioner was arrested and indicted for (1) conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846; (2) possession of more than five grams of cocaine base with intent to distribute (and aiding and abetting) in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B) and 18 U.S.C. § 2; (3) possession of a firearm in furtherance of a drug trafficking crime (and aiding and abetting) in violation of 18 U.S.C. §§ 924(c)(1) & (c)(2); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) & 924(e). App., *infra*, 4a-5a. Petitioner was convicted of all charges. *Id.* at 5a.

The district court sentenced petitioner to 15 years' imprisonment on count 4 under § 924(e)(1) because he (1) possessed a gun in furtherance of the drug trafficking crime and (2) had three previous convictions for violent felonies or serious drug offenses. App., *infra*, 5a-6a. The district court sentenced petitioner to an additional five consecutive years' imprisonment on count 3 under § 924(c) for possessing a gun in furtherance of a drug trafficking crime. *Ibid.* In so doing, the district court rejected petitioner's argument that § 924(c)(1)(A)'s "except" clause precluded imposition of a consecutive 5-year § 924(c) sentence for the same gun possession for which it had sentenced him to 15 years under § 924(e)(1). *Id.* at 7a. The district court concluded that § 924(c)(1)(D)(ii), which states that "no term of

imprisonment imposed on a person * * * shall run concurrently with any other term of imprisonment," required imposing an additional consecutive sentence. *Id.* at 28a.

Petitioner appealed, challenging, among other things, the lawfulness of the additional five-year § 924(c) sentence. App., *infra*, 2a. The Third Circuit acknowledged that the language "any other provision of law" "is the subject of disagreement among courts of appeals." *Id.* at 7a. The court held that "the most cogent interpretation is that the [except] clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 11a-12a. In its view, Congress added the "except" clause in 1998 only "to reflect the reorganization of the statute, which moved alternative minimum sentences into separate subsections." *Id.* at 12a. "In referring to alternative minimum sentences," the court explained, "the [except] clause mentions 'any other provision of law' to allow for additional § 924 sentences that may be codified elsewhere in the future." *Ibid.*

The court of appeals then proceeded to "test [its] interpretation of § 924(c) [against] other possible interpretations." App., *infra*, 14a. It began by expressly rejecting the view "that § 924(c) does not apply when a predicate offense carries a minimum sentence greater than the relevant minimum imposed by [§ 924(c) itself]." *Ibid.* Instead, it concluded that "the [except] clause refers to * * * greater minimum sentences provided by this subsection, not for predicate offenses." *Ibid.* It further determined that § 924(c) minimum sentences "apply *in addition to* the

punishment provided for a predicate offense." *Ibid.* (internal quotation marks omitted). "[R]eading the [except] clause to refer to the minimum sentence for a predicate offense," it continued, "would narrow the scope of § 924(c)" when Congress had intended to broaden it. *Id.* at 15a.

The court then considered whether the phrase "any other provision of law" could refer to greater mandatory minimums imposed under other provisions for possessing the same firearm. The court acknowledged that it "would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply.'" *Id.* at 16a (quoting *United States* v. *Whitley*, 529 F.3d 150, 155 (2d Cir. 2008)). The court further recognized that this interpretation would avoid "some of the problems" of the broader view that would include all predicate offenses within the "except" clause. *Ibid.* In the end, however, the Third Circuit rejected this reading, explaining that it could sometimes lead to more-blameworthy defendants receiving shorter minimum sentences than less culpable ones. *Id.* at 17a. Although it noted that district courts could avoid these problems by exercising their discretion to increase a sentence in appropriate cases, it thought such a solution "ad hoc" and believed it unavailable in 1998 when Congress added the "except" clause to the statute. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Exacerbates Two Deep Splits Among The Circuits Regarding The Scope Of The "Except" Clause Of 18 U.S.C. § 924(c)(1)(A)

Section 924(c)(1)(A) imposes mandatory additional consecutive sentences upon any person who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime," or "possesses a firearm" "in furtherance of any such crime." 18 U.S.C. § 924(c)(1)(A). By its terms, however, § 924(c)(1)(A) does not apply when "a greater minimum sentence is otherwise provided by this subsection or by *any other provision of law*." *Id.* (emphasis added). As the Third Circuit expressly acknowledged below, the interpretation of this "except" clause is the "subject of disagreement among courts of appeals." App., *infra*, 7a.

The "except" clause has, in fact, generated splits among nine courts of appeals over two distinct questions: (1) whether the legislatively mandated exception applies when a defendant is subject to "a greater mandatory minimum sentence" for a drug trafficking crime or crime of violence that supplies the predicate for the § 924(c)(1)A) conviction; and (2) whether the exception is triggered when the longer mandatory minimum sentence is imposed for a firearm offense outside of § 924(c) itself. The depth and sharpness of these splits, as well as the resultant confusion among the circuits, warrant this Court's review.

A. The Courts Of Appeals Are Divided As To Whether The "Except" Clause Applies When The Greater Minimum Sentence Is Imposed For A Predicate Offense

The courts of appeals are split 8-1 on whether the "except" clause applies to sentences imposed for predicate crimes. The United States has acknowledged that this particular conflict alone is sufficiently important to warrant this Court's review. See U.S. Br. in Opp. at 7, 10, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009).

In holding that the statutory language "any other provision of law" does not include predicate crimes, the Third Circuit joined six other circuits that had already reached the same conclusion. See *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009) (citing *United States* v. *Collins*, 205 Fed. Appx. 196, 198 (5th Cir. 2006)); *United States* v. *Easter*, 553 F.3d 519, 525 (7th Cir. 2009); *United States* v. *Parker*, 549 F.3d 5, 11–12 (1st Cir. 2008); *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *United States* v. *Studifin*, 240 F.3d 415, 423–424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386 (8th Cir. 2000). The Eleventh Circuit has since joined these seven. *See United States* v. *Segarra*, No. 08-17181, 2009 WL 2932242, at *3 (11th Cir. Sept. 15, 2009).

Ignoring the plain language of the statute, these courts of appeals have instead rested their arguments on either the supposed congressional purposes or the sparse legislative history behind the clause. The Third, Fourth, Seventh, and Eighth Circuits, for

example, have reasoned that applying the "except" clause to predicate offenses would contravene Congress's assumed aim to increase sentences for drug trafficking and violent crimes. App., *infra*, 15a; *Easter*, 553 F.3d at 526; *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389–390. The Seventh and Eleventh Circuits also have held that counting predicate offenses as "any other provision of law" would make § 924(c) a sentence enhancement instead of a stand-alone crime. *Easter*, 553 F.3d at 526; *Segarra*, 2009 WL 2932242 at *3 (citing *Easter*).

The Third, Fourth, Fifth, Seventh, and Eighth Circuits have also refused to read "any other provision of law" to include predicate offenses because doing so, they believed, would lead to courts imposing sentences disproportionate to the underlying criminal offense. App., *infra*, at 15a; *Easter*, 553 F.3d at 526; *Collins*, 205 Fed. Appx. at 198; *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389. The Third, Fourth, Sixth, and Eighth Circuits also have reasoned that Congress added the "except" clause in 1998 only to reflect the reorganization of § 924(c)'s penalty provisions. App., *infra*, 12a; *Jolivette*, 257 F.3d at 586-587 (quoting with approval the Fourth Circuit's analysis of the purposes behind the amendment, *Studifin*, 240 F.3d at 423-424); *Studifin*, 240 F.3d at 422-423 (agreeing with Eighth Circuit's analysis in *Alaniz*, 235 F.3d at 389); *Alaniz*, 235 F.3d at 389.

The Second Circuit, by contrast, has squarely held that predicate crimes count as "any other provision of law." *United States* v. *Williams*, 558 F.3d 166, 168 (2d Cir. 2009). In so holding, the Second Circuit

relied upon the reasoning of *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), in which it had held that the "except" clause applied to a sentence for a *firearm-related* offense. *Whitley*, 529 F.3d at 151. Acknowledging this Court's repeated admonition to "give statutes a literal reading and apply the plain meaning of the words Congress has used," the Second Circuit read the phrase "any other provision of law" to mean "literally what it says." *Whitley* 529 F.3d at 156 (citing *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)); see *Williams*, 558 F.3d at 171.

The Second Circuit also considered and rejected the arguments advanced against giving the statutory language its plain meaning. It held that Congress could have enacted a series of increased minimum sentences and also have made "a reasoned judgment that when a defendant is exposed to two minimum sentences, some of which were increased by the * * * amended version [of § 924(c)], only the higher minimum should apply." *Whitley*, 529 F.3d at 155. The Second Circuit also reasoned that there was no serious danger of anomalous results because the sentences at issue were *minimums*, not maximums. *Ibid.* Under the sentencing regime Congress enacted, it held, a sentencing judge can "increase the sentence above the minimum" when more serious conduct warrants doing so. *Ibid.*

The Second Circuit also rejected the notion that the "except" clause merely reflected Congress's reorganization of the subsection in 1998. It held that the reorganization created no problems that would necessitate the "except" clause and that, even if it

had, this alone could not explain the addition of the broad phrase "or by any other provision of law." *Whitley*, 529 F.3d at 154. Notably, while identifying no ambiguity in the plain language of the provision, the Second Circuit stated that, even if ambiguity were present, this Court's directive to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors" would compel rejection of the majority position. *Williams*, 558 F.3d at 173 (citing *United States* v. *Santos*, 128 S. Ct. 2020, 2026, 2028 (2008)); see also *Whitley*, 529 F.3d at 156 ("[W]e are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant.").

B. The Courts Of Appeals Are Also Deeply Split Over Which Firearm-Related Minimum Sentences Trigger The "Except" Clause

The courts of appeals are even more sharply divided over which firearm-related sentences trigger the exception. The Second, Sixth, and Eighth Circuits have held that the "except" clause applies to minimum sentences imposed for firearm-related conduct covered by § 924(c) and by any other provision of law. The Third, Fourth, and Fifth Circuits, by contrast, have held that the "except" clause is not triggered by any firearm offenses currently codified outside of § 924(c). Rather, those courts have held that the clause "simply reserv[es] the possibility that another statute or provision [in the future] might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Studifin*, 240 F.3d at 423; see App., *infra*, 12a (holding that the "except" clause merely "allow[s]

for additional § 924(c) sentences that may be codified elsewhere in the future"); *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006) (given precedential significance by *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009)). The First Circuit has strongly indicated that the "except" clause is triggered by all firearm offenses but has stopped short of so holding.[1]

1. The Second, Sixth, and Eighth Circuits have all held that the "except" clause is triggered by minimum sentences for firearm offenses covered either by § 924(c) or by any other provision of law. As discussed above, the Second Circuit in *Whitley* held that the "except" clause applies to a longer minimum sentence mandated for the same firearm by any provision of law. See pp. 10-11, *supra*. The Eighth Circuit similarly held that the "except" clause applies

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[1] The Eleventh Circuit, although it has rejected the broader predicate view, has not addressed the firearm question. See *Segarra*, 2009 WL 2932242. And the Seventh Circuit's view of the matter is somewhat unclear. On the one hand, it somewhat ambiguously appears to adopt the Third, Fourth, and Fifth Circuits' position. *Easter*, 553 F.3d at 526 (stating that the "most natural reading of the 'except' clause is that a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* § 924(c)(1) offense"). On the other hand, in reaching this conclusion, it conflated the Fourth and Eighth Circuits' opposed positions. *Id.* at 525 (claiming "[t]he Fourth Circuit echoed the Eighth Circuit's position").

"to the firearm-related conduct proscribed either by 924(c)(1) or '*by any other provision of law.*'" *Alaniz*, 235 F.3d at 389 (emphasis added). Although it saw no ambiguity in the statute's text, *ibid.*, the Eighth Circuit also concluded that this reading gave § 924(c) "a sensible construction," *ibid.*, and respected Congress's policy decisions, *id.* at 389-390.

The Sixth Circuit largely adopted this approach in *Jolivette*. 257 F.3d at 587. Although it described the Eighth Circuit's reading as "entirely correct," the Sixth Circuit slightly narrowed the Eighth Circuit's rule. *Ibid.* Jolivette was convicted under 18 U.S.C. § 2113(d) for use of a dangerous weapon or device in the course of a robbery. *Id.* at 582. The Sixth Circuit held that, although this statutory language covered firearms, it was "not specific to [them]" and thus did not trigger § 924(c)'s exception. *Id.* at 587.

2. The Third, Fourth, and Fifth Circuits, by contrast, have held that the "except" clause refers only to provisions governing conduct exactly identical to that of § 924(c). In *United States* v. *Studifin*, the Fourth Circuit held that:

> the "any other provision of law" language provides a safety valve that * * * preserve[s] the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c). In other words, we read this language as simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation. 240 F.3d at 423.

In *Abbott*, the Third Circuit adopted this view. Fearing that applying § 924(c)'s "except" clause to any gun offense would lead to "anomalous results," App., *infra*, 16a, the Third Circuit restricted its application to "other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 11a-12a (citing *Studifin*, 240 F.3d at 423-424). The Fifth Circuit apparently has also adopted this interpretation. *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009) (adopting and giving precedential effect to *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006)). In *Collins*, the court had held that "the phrase 'any other provision of law' [refers] to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime." 205 Fed. Appx. at 198.

3. The First Circuit has strongly indicated that all firearm offenses are covered by the "except" clause, but has expressly reserved so holding. In *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), the First Circuit squarely rejected the argument that the "except" clause covers predicate offenses. It did so because it determined that the clause is better read to cover sentences for all firearm offenses:

> Section 924(c) dictates an additional minimum sentence for an underlying offense *because* of the presence of the firearm; thus, if "a greater minimum sentence is otherwise provided" *on account of the firearm,* then under the "except clause" that greater minimum might supersede the

> otherwise applicable section 924(c) adjustment. Conceivably, Congress wished to avoid a double increment for the same firearm.

Id. at 11. But in the end, the court left the question open. Because the case presented no danger of "double counting of [a] gun," the court determined that it "need not decide how the [firearm issue] would be resolved in [the First C]ircuit." *Id.* at 11-12.

* * *

As the above description makes clear, there is a 3-3 split as to whether the "except" clause includes all firearm offenses. The Second, Sixth, and Eighth Circuits stand on one side, and the Third, Fourth, and Fifth Circuits stand on the other. In addition, the First Circuit has indicated that it would side with the first group on this question but has stopped short of so holding.

Viewed more broadly, there is three-way split regarding the reach of the "except" clause. At one end of the spectrum, the Second Circuit reads the statute literally and thus includes within its reach mandatory minimum sentences for both predicate offenses and firearm offenses. At the other end of the spectrum, the Third, Fourth, and Fifth Circuits read the "except" clause exceedingly narrowly and do not include either predicate offenses or any firearm offenses outside of § 924(c) itself. In between these two positions, the Sixth and Eighth (and possibly the First) Circuits do not include predicate offenses but do include all or most firearm offenses within the "except" clause. The multiple splits and the confusion

among the circuits regarding this important and recurring issue in criminal sentencing warrant resolution by this Court.

II. The Court Of Appeals' Interpretation Of 18 U.S.C. § 924(c)(1)(A) Ignores The Plain Language Of The Statute And Finds No Support In The Legislative History

A. By Its Terms, § 924(c)(1)(A) Bars The Imposition Of An Additional, Consecutive Five-Year Sentence When A Court Has Already Sentenced The Defendant To A Mandatory Minimum Term Of At Least Five Years, Particularly For A Gun Crime

Section 924(c)(1)(A) imposes a minimum sentence of five years' imprisonment for the possession or use of a firearm during the commission of a crime of violence or drug trafficking "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by *any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). Despite this Court's frequent admonishments against distorting the plain language of statutes, see, *e.g.*, *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1788 (2008); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917), the Third Circuit's interpretation twists the "except" clause beyond recognition.

The "except" clause actually establishes two exceptions, each of which bars the imposition of additional, five-year mandatory minimum sentences.

First, the five-year minimum does not apply if another provision within the same subsection would impose a higher minimum. Second, the five-year minimum does not apply if "any other provision of law," 18 U.S.C. § 924(c)(1)(A), imposes a higher mandatory minimum sentence. This case turns on the second exception and the meaning of the simple phrase "any other provision of law."

This Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–254 (1992). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Central Trust Co.* v. *Official Creditors' Comm. of Geiger Enter., Inc.*, 454 U.S. 354, 359–360 (1982) (quoting *Caminetti*, 242 U.S. at 485). Applying that "elementary" principle to this statute, the Second Circuit correctly reasoned that "any other provision of law" means exactly what it says: "any other provision of law." See *United States* v. *Whitley*, 529 F.3d 150, 153 (2d Cir. 2008).

This Court reached a similar conclusion—and followed the same route—when interpreting another phrase in the *very same subsection*. In *United States* v. *Gonzales*, 520 U.S. 1 (1997), this Court interpreted the meaning of "any other term of imprisonment" in § 924(c) and, specifically, whether that term included both state and federal terms. To this Court, stating the question answered it: "The question we face is whether the phrase 'any other term of imprisonment'

'means what it says, or whether it should be limited to some subset' of prison sentences." *Id.* at 5 (quoting *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980)).

This Court thus followed the plain language of the text, observing that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976)). Noting that "Congress did not add any language limiting the breadth of that word," the Court held that "we must read § 924(c) as referring to all 'term[s] of imprisonment.'" *Ibid.* Despite some legislative history pointing the other way and despite policy arguments made by the lower court and the dissent, this Court remained faithful to the principle that "[g]iven [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." *Id.* at 10.

The Third Circuit, by contrast, ignored the plain language of § 924(c) to read the second exception out of the statute. It reasoned that the "most cogent interpretation" of the "except" clause "refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." App., *infra*, at 11a-12a. This is an adequate interpretation of the first exception, which refers to "greater minimum sentence[s] otherwise provided by *this subsection*" (emphasis added). But it fails to give any meaning to the second exception and specifically to the phrase "any other provision of law." For that statutory language to have meaning, it must refer, at

the very least, to some provisions of law beyond § 924(c).

Faced with this difficulty, the Third Circuit invented a purpose for the second exception that the plain language nowhere suggests. According to the court, the second exception exists "to allow for additional § 924(c) sentences that may be codified elsewhere in the future." App., *infra*, 11a-12a; see also *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001) (proposing a similar "safety valve" reading of the second exception). This assertion is startlingly implausible. If correct, it means that Congress deliberately inserted the seemingly simple phrase "any other provision of law" to guard against the remote possibility that a future Congress might try to increase § 924(c) penalties not by straightforwardly amending § 924(c) itself, but by creating a provision somewhere else in the United States Code that is supposed to replace, not supplement, § 924(c). To say the least, such a reading imputes both an unreasonably high degree of cautiousness to the original enacting Congress and an implausibly low degree of thoughtfulness and care to any subsequent one.

The Third Circuit suggested that its interpretation of the "except" clause was consistent with the majority of courts of appeals to address the issue. App., *infra*, 19a. This is half right. As previously explained, the Third Circuit *did* join a majority of courts in holding that the "except" clause does not apply to sentences for predicate offenses—the first question presented. It joined a *minority* of courts of appeals, however, in holding that the

"except" clause does not cover firearm offenses beyond the ambit of § 924(c) itself—the second question presented.

As the majority of courts in the second split have recognized, excluding sentences for firearm offenses from the scope of the "except" clause is especially difficult to justify. The reason is straightforward. Section 924(c) imposes a mandatory minimum penalty for the use or possession of a firearm during a drug crime or crime of violence. If the "except" clause does not apply to other firearm offenses that also punish defendants for using or possessing the same firearm, there is a serious danger of double counting. See *Parker*, 549 F.3d at 11. By excluding firearm offenses that carry a greater minimum sentence than those provided by § 924(c), the statute both ensures that all defendants receive at least a minimum of five years and avoids penalizing defendants twice for the use or possession of the same firearm. While Congress can subject a defendant to two sentences for the same act in a single criminal transaction, it must clearly express its intent to do so. See *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). No such intent appears here.

The Third Circuit also argued that its strained interpretation was necessary to avoid anomalous results. App., *infra*, 16a-18a. As the Second Circuit has indicated, however, this concern is illusory. There are logical reasons for Congress to have "provided a series of increased minimum sentences" and to have decided that "where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply." *Whitley*, 529 F.3d at

155. And, in any event, as this Court emphasized in *Gonzales*, where the legislative directive is clear, it is not for courts to rewrite statutes "based on judicial perceptions of good sentencing policy." 520 U.S. at 9.

B. The Legislative History Undermines The Third Circuit's Interpretation

Because the language of § 924(c) is unambiguous, there is no need to look to the statute's history. *Gonzales*, 520 U.S. at 6. Even were this Court to do so, however, it would find no support for the unusual proposition that Congress intended to limit "any other provision of law" to some hypothetical provision it had not yet enacted.

Indeed, what appears in the legislative history supports the opposite interpretation. Congress enacted the "except" clause in 1998 as part of a larger response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which held that the previous version of the statute did not reach defendants who merely possessed rather than used a firearm in furtherance of a crime of violence or drug trafficking crime. 144 Cong. Rec. H10329-01 (1998). Debate centered on the propriety of such additional penalties; it did not directly address the meaning of the "except" clause itself.

One thing was clear, however. One of the bill's main sponsors wanted to send a signal that "[i]f you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th

Cong. (1997) (statement of Sen. Jesse Helms). Applying the plain meaning of the term "any other provision of law" would, of course, accomplish this goal—as would understanding the term as "any other provision of law" to include all firearm offenses.

In addition, the Department of Justice suggested to Congress that the "except" clause be removed from the bill. See *Whitley*, 529 F.3d at 154 (citing Letter from Andrew Fois, Ass't Attorney General, Office of Legislative Affairs, to Albert Gore, Feb. 25, 1997). Congress obviously refused to do so. All of this confirms that Congress intended the term "any other provision of law" to mean what it says.

C. The Third Circuit's Interpretation Of § 924(c) Violates The Normal Rule That A Court Should Resolve Ambiguities In Criminal Statutes In Favor Of The Defendant

The statute's plain language and the legislative history both indicate that Congress intended "any other provision of law" to mean exactly that. Even if there were some ambiguity, however, the rule of lenity would require that it be resolved in favor of the defendant. See *Santos*, 128 S. Ct. at 2025; *United States* v. *Granderson*, 511 U.S. 39, 53-54 (1994).

The Third Circuit's approach turns the rule of lenity on its head. The court ignored the plain language of the statute to create an ambiguity that does not exist; it then compounded that error by resolving the ambiguity with an implausible interpretation that favors the government rather than the defendant. As the Second Circuit observed,

"other than the decisions * * * that have rewritten the 'except' clause * * * to escape its plain meaning, we are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant." *See Whitley*, 529 F.3d at 156. The judgment below cannot stand.

III. This Case Presents Recurring And Important Issues Of Federal Law, And It Is An Ideal Vehicle Through Which To Resolve Them

A. The Government Concedes That The Meaning Of The "Except" Clause Is A Recurring And Important Issue

The government has recognized that the reach of the "except" clause is a recurring and important issue, worthy of this Court's attention. See U.S. Br. in Opp. at 7, 10, *McSwain* v. *United States*, petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009). As the government acknowledges, § 924(c) is "a significant and frequently used criminal statute." Pet. for En Banc Rev. at 19, *United States* v. *Williams*, 558 F.3d 166 (2d Cir. 2009).

Indeed, prosecutions under § 924(c) are a staple of federal criminal practice. More than two thousand defendants are charged with violating this provision each year. Bureau of Justice Statistics, Federal Justice Statistics Program, Number of Defendants in Cases Filed Under 18 U.S.C. § 924(c), FY2003-FY2007, http://fjsrc.urban.org (last accessed Oct. 16, 2009). And as the many appellate cases reviewed in this petition indicate, prosecutors do not hesitate to invoke § 924(c) when charging defendants already

subject to other mandatory minima. See pp. 8-16, *supra* (collecting cases). As long as the rules adopted below prevail, prosecutors undoubtedly will continue to seek these additional sanctions under § 924(c).

This issue is of fundamental importance because § 924(c), as currently interpreted by several courts of appeals, significantly and unfairly increases a defendant's sentence for conduct already penalized by longer mandatory minimums. As one expert concluded, "use of [§ 924(c)] can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant's conduct and difficult to justify under any principled theory of punishment." Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 Geo. Mason L. Rev. 303, 341 (2009). Given the frequency with which defendants are sentenced under § 924(c), the splits and confusion among the courts of appeals, and the harshness of imposing multiple mandatory minimum sentences, this Court's review is warranted.

B. This Case Is An Ideal Vehicle For The Court To Settle Both Splits Regarding The "Except" Clause

This case is an ideal vehicle through which to resolve, clearly and finally, the proper scope of the "except" clause. The Third Circuit's decision below fully addressed both of the questions that have split the courts of appeals, namely whether the "except" clause applies to predicate offenses and whether it applies to firearm offenses. These questions are interrelated and ought to be addressed simul-

taneously in order to provide proper and sufficient guidance to the courts of appeals.

The government has stated its intent to file a petition for a writ of certiorari in *United States* v. *Williams*. See U.S. Mot. for Ext. of Time to File Pet. for a Writ of Cert., 558 F.3d 166; U.S. Br. in Opp. at 7, 14, *McSwain*, *supra* (No. 08-9560). We respectfully submit, however, that this case presents a superior vehicle through which to address the meaning of the "except" clause, because *Williams* raises *only* the question of how to apply the "except" clause to predicate offenses generally. It does not raise the more specific question of how that clause would apply where the longer mandatory minimum arises from a firearm offense.

The Court should grant review in this case rather than in *Williams* in order to avoid the piecemeal adjudication of these genuinely interrelated issues. Deciding only a predicate offense case such as *Williams* will not necessarily resolve cases like this one. That is because, if the government were correct that the "except" clause is not triggered by all other mandatory minimums, it will remain to be decided whether § 924(c) can be applied to impose an additional five-year sentence where the defendant has already received a longer mandatory minimum for his use of the very same firearm and, if so, whether firearm offenses outside of § 924(c) count.

Put differently, without addressing the second question, there is the possibility that the Court could determine only what is *not* included within the "except" clause, which would leave lower courts

guessing—and disagreeing—as to what *is* included. The second question presented, moreover, has generated a sharper division among the courts of appeals. Even courts that do not follow the plain meaning of the "except" clause have indicated that it must exclude double-counting for firearm offenses. See, *e.g.*, *Alaniz*, 235 F.3d at 389; *Jolivette*, 257 F.3d at 587.

Only a firearm case will provide the court with full adversarial testing of the second question. The defendant and would-be respondent in *Williams*, for example, will have an interest in arguing only that the "except" clause applies to all predicate offenses. He will have no incentive to argue in the alternative that, at a minimum, the clause prevents the imposition of a consecutive mandatory minimum sentence under § 924(c) where the defendant already has received a longer mandatory sentence for the very same firearm. Because *Abbott* permits this Court to decide both of the § 924(c) questions with the benefit of full adversarial testing, there is no single better case for this Court to address the scope of the "except" clause. Therefore, at a minimum, this Court should grant certiorari in *Abbott* in order to offer a comprehensive interpretation of the "except" clause and thereby give maximum guidance to the lower courts.

C. If This Court Wishes To Consolidate Predicate Offense And Firearm Offense Cases, It Should Grant This Petition and The Petition In *London*

The Third Circuit held that the "except" clause does not apply to predicate offenses, and it also held that it does not apply to firearm offenses outside of § 924(c). There would be no obstacle, therefore, to this Court reaching both issues were it to review the Third Circuit's decision in *Abbott*. Cf. *Clingman* v. *Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below.")

Abbott, however, is a firearm case. The other mandatory minimum sentence imposed on Mr. Abbott (in addition to the minimum wrongly imposed under § 924(c)) arose from a firearm offense. Because predicate offense and firearm cases present different factual contexts and slightly different statutory contexts, the Court might wish to consolidate a firearm and a predicate offense case.

This would, at first blush, argue in favor of granting both this petition and the petition in *Williams*. There is, however, an even better alternative, assuming that the Court is inclined in this direction. The Court should instead grant this petition and the petition in *London* v. *United States*, No. 09-5844 (filed Aug. 11, 2009), and consolidate the cases.

London, like *Williams*, is a predicate offense case. The undersigned counsel of record, however,

represents both Mr. Abbott and Mr. London and therefore would be able to submit consolidated briefing and argument, allowing this Court to offer maximum guidance to the lower courts with the most efficient allocation of resources.

In *London*, the district court imposed upon petitioner London both a ten-year mandatory minimum sentence for violation of 18 U.S.C. § 841 (a drug offense) and a consecutive five-year sentence for use of a firearm under § 924(c). 568 F.3d at 564. The Fifth Circuit rejected the argument that the greater mandatory minimum sentence for the predicate drug offense precluded imposition of the § 924(c) sentence, adopting the reasoning of its earlier decision in *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006). *Id.*

Mr. London filed a *pro se* petition squarely raising this issue. The government's brief in opposition, if any, is currently due November 12, 2009. The undersigned counsel of record will file a reply brief in support of Mr. London' petition, if necessary.

Consolidating *Abbott* and *London*—as opposed to *Abbott* and *Williams*—would allow briefing and argument by one set of counsel. This, in turn, would ensure that both questions regarding the meaning of the "except" clause are fully but concisely presented to this Court for decision.[2] Consolidating *Abbott* and *London* rather than *Abbott* and *Williams* would also mean that the defendants are the petitioners and the

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[2] Mr. Abbott and Mr. London both have given their fully informed consent to the undersigned counsel of record's joint representation.

government is the respondent in both cases. This would avoid the practical difficulties and awkwardness of consolidating cases and holding a single oral argument where the United States is the petitioner in one case (*Williams*) and the respondent in the other (*Abbott*) and there are two related but nonetheless distinct questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1623

UNITED STATES OF AMERICA,

v.

KEVIN ABBOTT,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-cr-00333)
District Judge: Honorable Cynthia M. Rufe

Argued March 3, 2009
Before: SCIRICA, *Chief Judge,* SLOVITER and
HARDIMAN, *Circuit Judges.*

(Filed: July 28, 2009)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

Kevin Abbott appeals his conviction and sentence following a jury trial. Abbott seeks a new trial, claiming the District Court erred when it denied his motion to suppress evidence and granted the Government's motion *in limine* to admit his prior conviction into evidence. Abbott also claims the District Court erred by imposing consecutive mandatory minimum sentences of fifteen years pursuant to 18

U.S.C. §924(e) and five years pursuant to 18 U.S.C. §924(c). For the reasons that follow, we will affirm.

I.[1]

Acting on a tip that a black male was selling illegal drugs on the 1700 block of Fontain Street, the Philadelphia Police Department arranged for a confidential informant to make controlled purchases of heroin. On September 21 and 22, 2004, the informant approached a man later identified as Michael Grant, who was standing in front of 1739 Fontain Street (the Premises), and offered cash to Grant in exchange for drugs. Grant then entered the Premises and returned with heroin.

Also on September 22, 2004, but before the controlled purchase that day, police obtained a warrant to search the Premises that authorized them to seize drugs, drug paraphernalia, money, and weapons. The warrant also authorized the search of "all persons present who may be concealing narcotics or other illegal contraband." In the affidavit of probable cause, a police officer described the controlled purchase on September 21 in detail and stated that in his experience, "defendants [] frequently sell and stash narcotics from inside a location."

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[1]We recount the facts in the light most favorable to the Government, as the verdict winner. *See United States v. Voigt*, 89 F.3d 1050, 1080 (3d Cir. 1996).

Before police executed the warrant, they arranged a third controlled purchase for September 23, 2004. On that day, Grant said he had no heroin, so the informant requested crack cocaine, which Grant retrieved from an abandoned lot. Shortly after the exchange, police returned to execute the search warrant and they found Grant in front of the Premises. As Grant was being arrested, Appellant Abbott — who was standing in the doorway of the Premises as police approached — slammed the door when officers identified themselves. The police broke down the door, entered the house, and arrested Abbott as he was trying to escape through a kitchen window. At the time of his arrest, Abbott had $617 in cash (including $20 in prerecorded buy money) as well as a key to the front door of the Premises, a small bag of marijuana, and a false driver's license. In addition, ultraviolet light revealed residue from the marked bills on Abbott's hands.

A search of the Premises uncovered drugs, drug paraphernalia, and two handguns. Much of the contraband and tools of the drug trade were in plain view in a front room, including codeine syrup, empty bottles, a scale, and crack cocaine. The handguns were found hidden behind furniture and inside a closet.

II.

On June 14, 2005, a federal grand jury returned a four-count indictment against Abbott and Grant, charging them with: (1) conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846; (2) possession of more than five

grams of cocaine base with intent to distribute, and aiding and abetting, in violation of

21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 2; (3) possession of a firearm in furtherance of a drug trafficking crime, and aiding and abetting, in violation of 18 U.S.C. §§924(c)(1) and (c)(2); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e).

Grant pleaded guilty, but Abbott went to trial. Before the jury was empaneled, Abbott filed a motion to suppress evidence, arguing that the search was illegal because the "all persons" warrant was overbroad. For its part, the Government filed a motion *in limine* to admit Abbott's prior felony conviction into evidence under Federal Rule of Evidence 404(b). The District Court denied Abbott's motion to suppress and granted the Government's motion *in limine*.

At trial, the Government called Grant as a witness against Abbott. Grant testified that he and Abbott sold drugs together for several months, and that he had seen Abbott carry one of the handguns recovered from the house. In addition, the Government called a police officer who had arrested Abbott three years earlier for selling cocaine in front of the Premises as evidence of Abbott's knowledge or intent pursuant to Rule 404(b). The District Court issued a cautionary instruction to the jury before the officer testified in this regard. The jury convicted Abbott of all four charges.

The District Court sentenced Abbott to what it deemed the statutory mandatory minimum: a total of 240 months imprisonment, comprised of 180 months on Count 4 (possession of a firearm by a convicted felon in violation of §§ 22(g) and 924(e)); and 60 months on Count 3 (possession of a firearm in furtherance of a drug trafficking crime in violation of §§ 924(c)(1)(A) and (c)(2)).[2]

Abbott did not dispute that his 180-month sentence on Count 4 was mandated by the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA), because he had three previous convictions for "violent felon[ies] or [] serious drug offense[s]." § 924(e)(1). The District Court found that Abbott faced an additional 60 months incarceration on Count 3 for possession of a firearm in furtherance of a drug trafficking crime pursuant to § 924(c)(1)(A), which must be imposed "*in addition to* the punishment . . . for [the] drug trafficking crime." *Id.* (emphasis added). As the District Court also noted, § 924(c) provides that "no term of imprisonment imposed on a person under [§ 924(c)] shall run concurrently with any other term of imprisonment imposed on the person." § 924(c)(1)(D)(ii).

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[2]Abbott was also sentenced to terms of imprisonment of 120 months for violating 21 U.S.C. § 846 and 120 months for violating 21 U.S.C. § 841(a)(1). Because the District Court ordered these sentences to run concurrently, they are not at issue on appeal.

Despite this language, Abbott objected to his sentence on the basis of § 924(c)'s prefatory clause, which begins: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law . . ." §924(c)(1)(A). Because ACCA subjected him to a 180-month minimum sentence, *see* §924(e), Abbott argued that he was exempt from the consecutive minimum sentence imposed by § 924(c). The District Court rejected Abbott's argument, noting that several other courts of appeals have held that "the plain meaning of section 924(c) clearly states that a term of imprisonment imposed under section 924(c) cannot run concurrently with any other term of imprisonment imposed for any other crime, including a sentence under [ACCA]." United States v. Abbott, No. 05-333-1, 2008 WL 540737, at *2 n.8 (E.D. Pa. Feb. 27, 2008). Abbott filed this timely appeal and we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

III.

A.

Although Abbott assigns error to the District Court both at trial and sentencing, we turn first to the sentencing issue because it is the issue of most precedential import as it is the subject of disagreement among courts of appeals.

Several other courts of appeals have interpreted § 924(c) in circumstances similar to Abbott's. *See United States v. Easter,* 553 F.3d 519 (7th Cir. 2009); *United States v. Parker,* 549 F.3d 5 (1st Cir. 2008);

United States v. Whitley, 529 F.3d 150 (2d Cir. 2008); *United States v. Collins,* 205 Fed. Appx. 196 (5th Cir. 2006); *United States v. Studifin,* 240 F.3d 415 (4th Cir. 2001); *United States v. Jolivette,* 257 F.3d 581 (6th Cir. 2001); *United States v. Alaniz,* 235 F.3d 386 (8th Cir. 2000). For the reasons that follow, we join the majority of these courts in holding that a sentence imposed for a separate offense cannot supplant or abrogate a § 924(c) sentence under the statute's prefatory clause.

As in all cases of statutory interpretation, our inquiry begins with the language of the statute and focuses on Congress' intent. *See United States v. Whited,* 311 F.3d 259, 263-64 (3d Cir. 2002). In this case, we must examine the relevant subsection in its entirety:

> (A) *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–*
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

§ 924(c)(1) (emphasis added).

The context of § 924(c)(1) reflects significant structural alterations made in 1998, when Congress added the "possesses in furtherance" clause to broaden the statute's reach.[3] The prior version of the statute read:

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[3]The prior version of § 924(c)(1) merely prohibited using or carrying a firearm "during and in relation to" a predicate offense. In Bailey v. United States, 516 U.S. 137 (1995), the Supreme Court held that "using" a firearm meant actively employing it. In response, Congress superseded Bailey by amending the statute to prohibit possession of a firearm "in furtherance of" a predicate offense. See Studifin, 240 F.3d at 420-2 1; Alaniz, 235 F.3d at 3 86-90 (both discussing legislative history).

Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking*

> *crime in which the firearm was used or carried.*

§ 924(c)(1) (1996) (emphasis added).

A comparison of the current and prior versions of § 924(c) demonstrates that the statute has consistently specified a minimum additional sentence that must be imposed consecutively to any other term of imprisonment when a "crime of violence or drug trafficking crime" involves a firearm. But what is the scope of the prefatory clause in the current version of § 924(c)(1)(A)? Read in context, the most cogent interpretation is that the prefatory clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses. *See Studifin,* 240 F.3d at 423-24 ("Examining the statute as a whole, particularly in light of the language of § 924(c) and the purpose behind the 1998 amendments, we do not believe that Congress intended to narrow § 924(c) by eliminating mandatory consecutive sentences where another provision imposes a higher mandatory minimum sentence for conduct other than that described in § 924(c)."); *Easter,* 553 F.3d at 525-26. The prefatory clause was added in 1998 to reflect the reorganization of the statute, which moved alternative minimum sentences into separate subsections. *See Studifin,* 240 F.3d at 423 ("We agree with the *Alaniz* court that in light of the structure and language of § 924(c)(1), it is clear that the 'except to the extent' language is designed to 'link the remaining prefatory language in (c)(1)(A) to' the other subdivisions.") (quoting *Alaniz,*

235 F.3d at 389). For example, the 1998 amendment made brandishing a weapon during a predicate offense subject to a seven-year minimum sentence under its own subsection, § 924(c)(1)(A)(ii). But if the weapon happens to be a short-barreled rifle, § 924(c)(1)(A)(i) prescribes a ten-year minimum. The prefatory clause simply makes clear that the ten-year minimum applies.

In referring to alternative minimum sentences, the prefatory clause mentions "any other provision of law" to allow for additional § 924(c) sentences that may be codified elsewhere in the future – in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922. *See* § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of [18 U.S.C § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both."). *See also Collins,* 205 Fed. Appx. at 197-98 ("[This language] provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater minimum consecutive sentence for a violation of § 924(c)."") (quoting *Studifin,* 240 F.3d at 423).

Our interpretation is not only consistent with the overwhelming majority of courts that have addressed the question, but more importantly, ameliorates confusion arising from Congress' failure to state explicitly the offenses to which the prefatory clause refers. In *Whitley,* the Second Circuit emphasized this silence in diverging from our sister circuits and holding that the prefatory clause refers to

any offense. *See Whitley,* 529 F.3d at 158. To test our interpretation of § 924(c), we turn to *Whitley* and other possible interpretations.

B.

Reading the prefatory clause literally and in isolation from its surrounding language, defendants have argued that § 924(c) does not apply when a predicate offense carries a minimum sentence greater than the relevant minimum imposed by §§ 924(c)(1)(A)(i)-(iii) or (B)-(C). *See, e.g., Parker,* 549 F.3d at 10-11; *Alaniz,* 235 F.3d at 386. Under this interpretation, a defendant who brandishes a firearm during a drug trafficking offense with a ten-year minimum sentence is not subject to § 924(c) because, even though the elements of the statute are satisfied, the drug crime's ten-year minimum constitutes "a greater minimum sentence" than the seven-year minimum of § 924(c)(1)(A)(ii).

This interpretation is "suspect on its face" for several reasons. *Parker,* 549 F.3d at 11. Initially, the prefatory clause refers to, *inter alia,* greater minimum sentences "provided by this subsection," not for predicate offenses. Second, the minimum sentences specified by § 924(c)(1) apply "*in addition to* the punishment provided for" a predicate offense. Thus, the prefatory clause requires a comparison between the minimum sentences specified in §§ 924(c)(1)(A)(i)-(iii) and (B)-(C), and, at a minimum, others associated with using, carrying, or possessing a firearm — not the predicate offense itself. Third, reading the prefatory clause to refer to the minimum sentence for a predicate offense would narrow the scope of § 924(c) in

derogation of Congress' intent to broaden the statute's reach through the 1998 amendment.

That the prefatory clause cannot refer to a predicate offense is borne out by the following hypothetical. Suppose defendant A is convicted of a drug trafficking crime that carries a minimum sentence of seven years imprisonment while defendant B is convicted of a more serious drug trafficking crime that mandates at least ten years imprisonment. Assume also that both defendants are convicted of brandishing a firearm under § 924(c)(1)(A)(ii), which carries a seven-year minimum sentence. Defendant A — who committed the less serious drug trafficking crime — will spend at least fourteen years in jail (a seven-year minimum sentence for the drug offense followed by at least a seven-year consecutive sentence under § 924(c)). Yet defendant B — who committed the more serious drug trafficking crime — would face a mandatory minimum sentence of only ten years. As this hypothetical illustrates, a defendant convicted of a predicate offense with a minimum sentence *one day longer* than the relevant minimum under § 924(c) would escape any further punishment while a defendant whose predicate offense carries *exactly the same* minimum sentence provided by § 924(c) sees his total sentence at least doubled. We are confident that Congress did not intend such a bizarre result. Indeed, every court to consider this argument has rejected it. *See Easter,* 553F.3d at 525-27; *Parker,* 549 F.3d at 10-12; *Alaniz,* 235 F.3d at 389-90; *Studifin,* 240 F.3d at 420-24; *Jolivette,* 257 F.3d at 586-87; *Collins,* 205 Fed. Appx. at 197-98.

Although it is clear that a sentence imposed for a predicate offense cannot supplant or abrogate the minimum sentence specified for a violation of § 924(c), Abbott's case is complicated by the fact that in addition to drug trafficking and possession of a firearm in furtherance of that offense, he was also convicted of possession of a firearm by a convicted felon under § 922(g) and ACCA. ACCA imposes its own fifteen-year minimum sentence which, for purposes of § 924(c), might be construed as "a greater minimum sentence [] otherwise provided by this subsection or by any other provision of law." Therefore, we next consider whether the prefatory clause may refer to sentences imposed under ACCA or another statute.

As the Second Circuit Court noted in adopting such an interpretation, it would be logical for Congress to "provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences . . . only the higher minimum should apply." *Whitley*, 529 F.3d at 155. Interpreting the prefatory clause to refer to higher minimum sentences imposed by ACCA or another statute avoids some of the problems cited above. Like the minimum sentences specified in § 924(c), ACCA's minimum may be deemed "in addition to" the sentence imposed for a §924(c) predicate offense. Moreover, reading the prefatory clause to encompass such sentences would not narrow the scope of predicate offenses eligible for enhanced punishment under § 924(c). As we shall explain, however, this interpretation also leads to highly anomalous results, illustrating why it has been widely rejected.

In this case, as in *Whitley,* the incongruity caused by interpreting the prefatory clause to refer to separate offenses is not readily apparent. The minimum sentence imposed by ACCA happens to be exactly five years more than the sentence Abbott received for his predicate drug offenses, which guarantees that Abbott will serve at least the minimum amount of time beyond his predicate sentences called for by § 924(c) — five years — even without a separate sentence under § 924(c). But what if Abbott had brandished the firearm, which would subject him to a seven-year minimum under § 924(c)? Abbott would face a net minimum sentence of only fifteen years, despite the fact that § 924(c) dictates a minimum of seven years beyond his ten-year drug sentences. Even more incongruously, a defendant situated identically to Abbott but who was *not* an armed career criminal would be subject to a *harsher* minimum sentence than Abbott — ten years for the drug offense plus at least seven consecutive years under § 924(c). *See Studifin,* 240 F.3d at 423 (noting this anomaly).[4]

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[4]As a final example, what if Abbott had been sentenced to thirty years for his drug offense? Under the Second Circuit's interpretation, ACCA's fifteen-year minimum would still preempt § 924(c)'s five-year minimum. Abbott would thus escape any additional punishment merely because his predicate sentence far exceeded the alternative minimum provide by ACCA. This would be contrary to Congress' clear intent in §924(c) to guarantee a minimum amount of additional jail time beyond that served for a predicate offense.

In *Whitley,* the Second Circuit was undaunted by these anomalous consequences because district judges have discretion to increase a sentence. 529 F.3d at 158. This view asks too much because it fixes the statute as illogical and anomalous, then posits an *ad hoc* solution in each individual case. Moreover, the purported "solution" was impossible in 1998 when the prefatory clause was written into the statute; Congress could not have intended to create such sentencing disparities with the clairvoyant expectation that seven years later the Supreme Court would, in *United States v. Booker,* 542 U.S. 220 (2005), grant district judges the discretion to cure such injustices.

Nevertheless, the Second Circuit justified departing from our sister circuits because, in its mind, the result is dictated by the "plain" language of the statute. *See Whitley,* 529 F.3d at 156 (concluding that other courts have "rewritten the 'except' clause in different ways to escape its plain meaning"). Even if the language of the statute plainly supported this interpretation, we would be loathe to adopt it because "statutory interpretations 'which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.'" *First Merchants Acceptance Corp. v. J.C. Bradford & Co.,* 198 F.3d 394, 403 (3d Cir. 2000) (*quoting Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982)). *See also Lamie v. United States Trustee,* 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts – *at least where the*

disposition required by the text is not absurd – is to enforce it according to its terms.") (emphasis added and internal quotation omitted).

We emphasize, however, that the language of the statute does *not* plainly support the *Whitley* court's interpretation. Although it is obvious that the prefatory clause has some limiting effect, its language does not plainly suggest that a sentence under § 924(c) may be abrogated or supplanted by a greater minimum sentence that happens to be imposed for an entirely separate offense. According to the prefatory clause, the sentences enumerated in § 924(c)(1)(A)-(C) do not apply when "a greater minimum sentence is otherwise provided" by law. This does not necessarily mean "when a greater minimum sentence *for any other crime* is otherwise provided by law." *See Parker*, 549 F.3d at 11 ("The [prefatory] clause . . . does not say 'a greater minimum sentence' for what; yet it has to have some understood referent to be intelligible. Here, the referent could be 'any other crime related to this case' or 'the underlying drug crime or crime of violence.' Either of those readings . . . require reading into the clause a referent not literally expressed."). To the contrary, at least one court has found that the language of the prefatory clause plainly *refutes* the Second Circuit's interpretation. *See Easter*, 553 F.3d at 526 ("In the contest between reading the [prefatory] clause to refer to penalties for the offense in question or to penalties for any offense at all, we believe the former is the most natural.").

Reading the prefatory clause in context as we must, we agree with the majority of courts that the

"except" language connotes a comparison between alternative minimum sentences for a violation of § 924(c), not between sentences for separate violations of § 924(c) and another statute.[5]

C.

In light of the aforementioned problems associated with any other reading of § 924(c)(1)(A), we conclude that the prefatory clause refers only to alternative minimum sentences for violations of § 924(c).

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[5]Nor can the prefatory clause be viewed as authorizing incremental sentencing enhancements. First, such an interpretation is impossible to reconcile with the mandate that § 924(c) sentences must run consecutively to all other sentences. See § 924(c)(1)(D)(ii). If Congress wanted to establish a net minimum sentence combining predicate offenses and § 924(c) offenses, it would have required § 924(c) sentences to run consecutively to their predicates, rather than all other sentences. Second, there is no basis in the text of § 924(c) to impose incremental minimum sentences less than those specifically enumerated in §§ 924(c)(1)(A)-(C). The language of the statute makes clear that § 924(c) defines a separate offense with its own minimum sentence, independent of any other offense or its minimum sentence and prohibited from running concurrently. See Easter, 553 F.3d at 526 ("[Section] 924(c) does not define an enhancement, it defines a standalone crime, and the penalty imposed under it must be imposed to run consecutively to any other sentence.") (citing *Harris v. United States*, 536 U.S. 545, 553 (2002)).

Therefore, the District Court did not err by imposing a consecutive five-year sentence.

IV.

We turn now to the constitutionality of the search warrant. In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Supreme Court held that police executing a warrant authorizing the search of a bar for narcotics lacked probable cause to search individual patrons within the bar. The Court stated:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91.

Seizing on this language, Abbott argues that police lacked probable cause to search him because this case is "perfectly analogous to *Ybarra.*" However, the search warrant in *Ybarra* referred only to the premises itself and the Court expressly declined to consider a situation like Abbott's, where "the warrant . . . authorizes the search of unnamed persons in a place

and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs." *Id.* at 92 n.4. Moreover, Abbott was searched in a private residence, not in a public business.

Although the Supreme Court has not addressed the issue, this Court has previously intimated that warrants authorizing the search of all persons present may be constitutional in certain circumstances. *See Doe v. Groody,* 361 F.3d 232, 239 (3d Cir. 2004) (concluding that if a search warrant was read in light of the officer's request to search "all occupants" of the residence, "then police had legal authority to search anybody that they encountered inside the house when they came to execute the warrant"). Consistent with *Doe* and two of our sister courts of appeals, we now hold that a warrant may authorize the search of all persons present if there is probable cause to believe that a premises is dedicated to criminal activity. *See Owens v. Lott,* 372 F.3d 267, 276 (4th Cir. 2004) ("An 'all persons' warrant can pass constitutional muster if the affidavit and information provided to the magistrate supply enough detailed information to establish probable cause to believe that all persons on the premises at the time of the search are involved in the criminal activity."); *cf. Marks v. Clarke,* 102 F.3d 1012 (9th Cir. 1997) ("An all persons present warrant might be appropriate for a different kind of locale – one dedicated exclusively to criminal activity – for example, a building or apartment used as a crack house, a barn used as a methamphetamine lab, or a warehouse used exclusively as a storage place for arms.").

The issue on appeal is not whether the search warrant was facially invalid, but whether it was supported by probable cause with respect to all persons present. *See Owens,* 372 F.3d at 276 ("In our view, the inclusion of 'all persons' language in a warrant presents probable cause issues rather than particularity problems."). Here, the affidavit supporting the search warrant for 1739 Fontain Street described Grant loitering in front of the house, meeting with the informant, taking his money, entering the house, returning with heroin, and giving it to the informant, all under police surveillance. The officer who completed the affidavit stated that in his experience, "defendants [] frequently sell and stash narcotics from inside a location." Because this is sufficient to establish probable cause that the house was being used for a criminal enterprise, the search of all persons present inside the house was justified.

Abbott argues that the potential for family or guests to be present negates probable cause with respect to *every* person who could be in the house. *See Marks,* 102 F.3d at 1029 ("[W]e believe that a warrant to search 'all persons present' for evidence of a crime may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity. That . . . would not be the case with respect to a raid on any family home where innocent family members or friends might be residing or visiting."); *Owens,* 372 F.3d at 276 ("Th[e] generalization [that subjects present at the scene of an illegal drug distribution commonly have drugs in their possession] was and is undoubtedly true, but it did

not provide the kind of particularized information that would have permitted the magistrate to reasonably conclude that there was a fair probability that any person seen by officers on the premises was there to partake in one side of a drug transaction or another."). We disagree.

The cases upon which Abbott relies are factually distinguishable from the present case. *Marks* involved a search for stolen property (electronics equipment) in two residences housing a large extended family with many children, and it was unlikely that the subject of the search would be found on a person. 102 F.3d at 1019-20. By contrast, the search warrant for 1730 Fontain Street was targeted at drugs which could easily be concealed on the person of anyone present as well as in the Premises. *Owens* involved the search of a single-family home based on an informant's unsubstantiated tip that drugs were being sold there, without police surveillance of illegal transactions. 372 F.3d at 271-72. Indeed, *Owens* specifically noted that probable cause to search all persons present might have arisen if "[t]here was [an] indication, for example, that this particular residence had a history of drug-related activities or that known drug dealers or users were frequenting the place." 372 F.3d at 278. That was precisely the case here.

Finally, to the extent that *Marks* and *Owens* may be read to suggest that observing a drug dealer retrieve drugs from inside a private residence does not establish probable cause to obtain a warrant to search those present in that residence, we reject that implication. To hold otherwise would eviscerate the

utility of "all persons present" search warrants, allowing drug dealers to ply their wares as Grant and Abbott did here. Drug dealers could set up shop in any house, confident in the knowledge that their contraband is not subject to seizure so long as it is possessed by unidentifiable individuals inside the house.

Because the police had probable cause to search persons inside the Premises, the District Court did not err in denying Abbott's motion to suppress physical evidence found on his person.[6]

IV.

For the foregoing reasons we will affirm the judgment of the District Court.

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[6]We also reject Abbott's argument that evidence of his prior arrest for selling drugs at the same location, which the Government offered to show knowledge or intent under Rule 404(b), was unfairly prejudicial. The District Court did not abuse its discretion in determining that the probative value of this testimony outweighed its potential prejudice. *See* FED. R. EVID. 403; *United States v. Givan,* 320 F.3d 452, 460-61(3d Cir. 2003) (upholding the admission of evidence of prior drug conviction under Rule 404(b)).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,	) CRIMINAL
	) ACTION
v.	) No. 05-333-1
	)
KEVIN ABBOTT,	)
Defendant.	)

MEMORANDUM OPINION

RUFE, J. **February 27, 2008**

After a jury trial in April 2006, Defendant Kevin Abbott was convicted of all indicted counts: Count 1, conspiracy to possess with intent to distribute a controlled substance under 21 U.S.C. § 846; Count 2, possession with intent to distribute more than 5 grams of crack cocaine under 21 U.S.C. § 841(a)(1) & (b)(1)(13); Count 3, possession of a firearm during or in relation to a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A); Count 4, possession of a firearm by an armed career criminal under 18 U.S.C. § 922(g)(1); and Count 5, aiding and abetting under 18 U.S.C. § 2. Prior to sentencing, on December 7, 2007, the government submitted its Sentencing Memorandum,[1] recommending that the Court impose the minimum mandatory sentence, which it calculated to be twenty

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[1]Doc. No. 148.

years. Abbott's Sentencing Memoranda[2] asked the Court to sentence him to a total fifteen-year mandatory minimum sentence, to be achieved by running the five-year consecutive sentence for his conviction of section 924(c)(1)(A) concurrently with the fifteen-year sentence to be imposed for his conviction of section 922(g)(1).

The Court commenced a sentencing hearing on February 5, 2008, which was then continued to allow the Court to more thoroughly research the mandates of the statutes governing Abbott's sentence in this matter, because neither the government nor counsel for Abbott presented adequate legal support for the sentences they sought. At the sentencing hearing, the Court found that Abbott's prior convictions qualify him as a "career offender" under sections 922 and 924.[3]

Abbott has been convicted of all indicted counts. Quite apparently, for the many factual bases supported by the trial record and the jury's verdict, this Court finds that Abbott's conviction on Count 4,

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[2]Doc. Nos. 146 &152.

[3]Abbott's prior convictions as an adult include: 1) simple assault, terroristic threats, recklessly endangering another person, and carrying a firearm on a public street; 2) possession with intent to distribute a controlled substance; 3) possession with intent to distribute "crack" cocaine; and 4) another possession with intent to distribute "crack" cocaine. See, e.g., Government's Mot. For Pretrial Detention at 4-5 [Doc. No. 13].

under section 922(g), relates squarely to the use or possession of a firearm "during and in relation to any crime of violence or drug trafficking crime,"[4] those specific drug offenses for which he was convicted in Counts 1 and 2. Thus, for his conviction on Count 3 under section 924(c)(1)(A), all parties agree that this Court must impose a minimum sentence of five years, consecutive to any sentence imposed on Counts 1 and 2. Likewise, the parties agree that the Court must impose a minimum sentence of fifteen years for Abbott's conviction on Count 4 because it invokes the Armed Career Criminal Act of 1984 ("ACCA")[5], which contains a career offender enhancement that applies to section 922 gun charges as follows:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[6] . . . .

Because Abbott was convicted of violating section 922(g)(1) at Count 4, and because he has three previous convictions for a "violent felony" or "serious drug offense" as defined by the statute, the Court is statutorily mandated to impose a fifteen-year sentence under section 922(g) and a five-year sentence under

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[4] 18 U.S.C. § 924(c)(1)(A).
[5] 18 U.S.C. § 924(e).
[6] 18 U.S.C. § 924(e)(1).

section 924(c). It is the conjunction of sentences for the weapons offenses that is still at issue, namely, whether the terms of imprisonment set by sections 922 and 924 may run concurrently.

Defendant argues that the mandatory fifteen-year sentence under section 922(g) and the mandatory five-year sentence under section 924(c) may run concurrently with each other, which the government opposes. This issue is one of statutory interpretation, as Abbott and the government read section 924 differently. The Court's first step in statutory interpretation is to first look at the plain meaning of the statute, and if it is clear, the court's analysis stops there[7]. The plain language of section 924(c)(1)(D)(ii) states, in pertinent part: "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried or possessed." The plain language of this statute clearly and unambiguously mandates the district court to run any sentence under section 924(c) consecutive to all other sentences stemming from a crime of violence or drug trafficking in the same criminal proceeding.

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[7]See, e.g., United States ex rel. Mistic PBT v. Housing Auth., 186 F.3d 376, 395 (3d Cir. 1999) ("The [Supreme] Court has instructed us to begin with a statute's text when discerning its meaning, and to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (quoting United States v. James, 478 U.S. 597, 604 (1986)).

Although the Third Circuit has not yet dealt squarely with this issue, there is a consensus among other circuits that any sentence imposed under section 924(c) must run consecutive to any other term of imprisonment imposed on a defendant, including a sentence imposed under 922(g)[8]. Thus, our guidance may be limited, but it is clear.

The Third Circuit has held that the government is not required, constitutionally or statutorily, to provide formal, pretrial notice of its intention to seek an enhanced sentence[9]. In the Court's further review of Abbott's sentencing record, it considered, *sua sponte,* the notice of prior convictions provided to Abbott to support the ACCA finding that resulted in the fifteen-year minimum sentence for his 922(g) gun charge. A cursory review of the record reveals at least four

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[8]The Fourth, Fifth, Sixth and Tenth Circuits, among others, have consistently held that the plain meaning of section 924(c) clearly states that a term of imprisonment imposed under section 924(c) cannot run concurrently with any other term of imprisonment imposed for any other crime, including a sentence under 922(g). See, e.g., United States v. Johnson, 32 F.3d 82, 85 (4th Cir. 1994) ("Concurring with our colleagues in the Fifth and Sixth Circuits, which have issued opinions on the exact same issue, we hold that, notwithstanding the overlap of statutory elements, Congress intended §924(c)(1) to apply to all crimes of violence, including car jacking."); United States v. Overstreet, 40 F.3d 1090, 1094-95 (10th Cir. 1994) ("Congress clearly expressed its intent that section 924(c)(1) apply cumulatively to all crimes of violence . . .").

[9]United States v. Mack, 229 F.3d 226, 231 (3d Cir. 2000).

notices of his prior convictions: 1) the Government's Motion for Pretrial Detention[10]; 2) the Information Charging Prior Offenses[11]; 3) the Government's Motion in Limine to Allow Impeachment of Defendants with Prior Convictions if Defendants Testify[12]; and 4) the Pre-Sentence Report. At no point, pre or post-trial, did Abbott raise objections to any convictions. The Court is satisfied that the qualifying prior criminal convictions underlying the ACCA enhanced sentence of fifteen years for violation of section 922(g) were duly noticed to Defendant and have been verified, and that the Court must find that enhancement appropriate in Abbott's case.

In the analogous case of United States v. Mack, Mack was convicted of being a felon in possession of a handgun under section 922(g)(1), and was sentenced to 262 months as a result of two sentence enhancements pursuant to the penalty provisions for section 922(g) offenses, located at sections 924(c) and 924(e)[13]. In Mack, the defendant challenged the application of the ACCA enhancement on due process grounds, arguing that he did not receive formal pretrial notice of the government's intent to seek an enhanced sentence[14]. The Third Circuit rejected Mack's challenge, holding that even if the government was required to provide notice, which it is not, Mack was provided with constitutionally adequate notice where the government provided him with certified copies of

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[10]Doc. No. 13.

[11]Doc. No. 45.

[12]Doc. No. 65.

[13]See Id. at 237-38 (Becker, C.J., concurring).

[14]Id. at 231.

the relevant prior convictions, the PSR stating that he was subject to ACCA enhancements, and formal pre-sentence notice that he would be sentenced as an armed career criminal[15]. Additionally, the Mack Court noted that Mack did not at any time contest the validity of his prior convictions in front of the district court[16]. Abbott equally failed to raise objections to his prior convictions at any point.

For the foregoing reasons, the Court rejects Defendant's contention that the sentences imposed for conviction on Count 3 (section 924(c)(1)(A)) and Count 4 (section 922(g)(1)) can run concurrently. Now, having settled that the Court is statutorily mandated to run the mandatory sentences for Counts 3 and 4 consecutively, the Court will calculate Abbott's final sentence pursuant to an analysis under 18 U.S.C. § 3553(a) and the mandatory minimum sentences to be imposed at the next scheduled sentencing hearing.

BY THE COURT

CYNTHIA M. RUFE, J.

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[15]Id. at 232.
[16]Id.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1623

UNITED STATES OF AMERICA,

v.

KEVIN ABBOTT,
Appellant

On Appeal from the United States District Court for
the Eastern District of Pennsylvania
(D.C. No. 05-cr-00333)
District Judge: Honorable Cynthia M. Rufe

SUR PETITION FOR REHEARING

Present:SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: August 31, 2009
SLC/cc: Counsel of Record

MEMORANDUM

Supreme Court, U.S.
FILED
DEC 22 2009

No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 09-479

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted under 18 U.S.C. 924(c)(1)(A), which provides for minimum prison sentences "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." He contends (Pet. 16-23) that the "except" clause of Section 924(c)(1)(A) exempts him from the five-year mandatory consecutive sentence imposed by that provision because the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), mandated a greater minimum sentence on a different count of conviction for a related firearms offense. The court of appeals rejected that argument and affirmed petitioner's sentence, which includes the consecutive five-year term prescribed by Section 924(c)(1)(A). Pet. App. 7a-21a.

Petitioner notes (Pet. 8-14) that the court of appeals' decision conflicts with the Second Circuit's decisions in

United States v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), and *United States* v. *Williams*, 558 F.3d 166 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). In *Williams*, the Second Circuit held, following its decision in *Whitley*, that the "except" clause exempts a defendant from any sentence under Section 924(c)(1)(A) whenever he is subject to a higher mandatory sentence for a different offense "arising from the same criminal transaction or operative set of facts." 558 F.3d at 171.

The government filed a petition for a writ of certiorari to review the Second Circuit's decision in *Williams*. *United States* v. *Williams*, No. 09-466, petition for cert. pending (filed Oct. 20, 2009). As that petition explains, the Second Circuit's interpretation of the "except" clause is incorrect. In addition to the court below, seven courts of appeals have rejected the Second Circuit's reading of Section 924(c) in *Williams*. See Pet. App. 14a-16a; *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam); *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *Easter*, 553 F.3d 519, 525-527 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *United States* v. *Studifin*, 240 F.3d 415, 421-424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). Two of those courts, in addition to the court below, have held, in conflict with *Whitley*, that a higher mandatory minimum sentence for a related firearms

offense does not exempt a defendant from a Section 924(c) sentence. Pet. App. 16a-19a; *Easter*, 553 F.3d at 524-527; *Studifin*, 240 F.3d at 421-424.

Petitioner contends that his petition raises an issue not present in *Williams*: whether the "except" clause applies when a defendant who violates Section 924(c) is subject to a higher mandatory minimum sentence for a related firearms offense. Pet. 3. But the Court's disposition of *Williams* will likely affect the proper resolution of this case: An offense arising from the same transaction or operative facts as a Section 924(c) offense includes a related firearms offense (*Whitley*) or the underlying drug trafficking or violent offense (*Williams*).

For the reasons stated in the *Williams* petition, that case provides an appropriate vehicle to resolve the conflict that exists between the courts of appeals over the proper interpretation of Section 924(c). Accordingly, this petition should be held for *United States* v. *Williams*, and then disposed of as appropriate in light of this Court's disposition of that case.*

Respectfully submitted.

ELENA KAGAN
Solicitor General

DECEMBER 2009

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* The government waives any further response to the petition unless this Court requests otherwise.

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 31 2009
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(3)

No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Other than a lone sentence defending the merits of the decision below, the government's memorandum does not dispute a single word of substance set forth in the petition. The government concedes that the circuits are squarely divided on *both* questions presented in this case, namely: (1) whether the term "any other provision of law" in § 924(c)(1)(A) includes the underlying drug trafficking offense or crime of violence; and (2) whether, if not, that term includes another offense involving possession of the same firearm in the same transaction. And the government does not dispute that both questions warrant this Court's review and that they are fully presented in this case. Nevertheless, the government cursorily asks this Court to hold this case pending the Court's disposition of *United States* v. *Williams*, No. 09-466, petition for cert. pending (filed Oct. 20, 2009), which presents only the first of these questions. That request should not long detain the Court.

Critically, the government does not deny that resolution of the first question in the government's favor may leave the second unanswered. As explained in our petition (at 25), "if the government were correct that the 'except' clause is not triggered by all other mandatory minimums, it will remain to be decided whether § 924(c) can be applied to impose an additional five-year sentence where the defendant has already received a longer mandatory minimum for his use of the very same firearm and, if so, whether firearm offenses outside of § 924(c) count." Thus, these questions are related but distinct, and

both are equally important. Indeed, were the Court to answer only the question presented in *Williams*, it might only decide what is *not* covered by the except clause, leaving lower courts guessing (and in conflict) as to what *is* covered by the clause. The government disputes none of this.

Instead, the government states only that resolution of the first question is "likely" to "affect" the answer to the second. Mem. 3. Put simply, the government suggests that it is better to address the second question through dicta in *Williams* than to resolve it squarely through a holding in this case. That is exactly backwards. This Court should decide both questions on full briefing and argument presented by parties whose interests are directly at stake. As explained in the petition (at 26), the respondent in *Williams* would have no incentive to argue that, even if the except clause is not triggered by *every other* offense imposing a longer mandatory minimum, it is triggered where, as here, a longer mandatory sentence is imposed for the *very same firearm-related conduct* giving rise to the § 924(c) charge. Yet again, the government disputes none of this.

It is not hard to discern the reason behind the government's preference to have *Williams* considered in isolation: The second question presented here is even more difficult for the government than the first. Here, even if the government were to succeed in arguing that "any other provision of law" does not mean what it says (such that any longer mandatory minimum triggers the except clause), the government

must then explain why the except clause would not at least bar the imposition of multiple consecutive mandatory minimum sentences for the same firearm-related conduct. The government is not eager to take up that burden because it is difficult then to say what the statutory language *does* mean. The government could well find itself defending such bizarre conclusions as that reached by the court of appeals below—*i.e.*, that Congress enacted the words "any other offense" to apply only to "additional § 924 sentences that may be codified elsewhere in the future." Pet. App. 12a. That is more an exercise in statutory imagination than statutory construction, and the government is understandably eager to postpone it. But that, of course, is no reason to deny certiorari on an issue so plainly warranting this Court's review.

In the end, the government does not seriously dispute that this case should be granted. If the Court's preference is to grant a firearm-related case such as this one along with a non-firearm-related case, the best course remains to grant this case and *London* v. *United States*, No. 09-5844, petition for cert. pending (filed Aug. 11, 2009). As explained in the petition (at 27-29), the undersigned counsel of record represents both petitioners and will be well-positioned to present consolidated briefing and argument on both questions. (Once more, the government disputes none of this.) At the very least, the Court should grant and consolidate this case with *Williams* to ensure that both of these important questions—and the separate conflicts each has generated—are resolved directly and with the benefit of full adversarial testing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2009

JOINT APPENDIX

Supreme Court, U.S.
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No. 09-479

In The
Supreme Court of the United States

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

U.S. District Court
Eastern District of Pennsylvania
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2:05-cr-00333-CMR

UNITED STATES OF AMERICA
v.
ABBOTT ET AL.

Date Filed	#	Docket Text
06/14/2005	1	SEALED INDICTMENT as to KEVIN ABBOTT (1) count(s) 1, 2, 3, 4, MICHAEL GRANT (2) count(s) 1, 2, 3, 4. (cwsl). Additional attachment(s) added on 6/28/2005 (cmcsl,). (Entered: 06/14/2005)
04/07/2006	80	Minute Entry of 4/6/06 as to KEVIN ABBOTT before the HONORABLE CYNTHIA M. RUFE. RE: Jury Trial (Day-3). All Jurors Present. Defense Rests. Closing Arguments of Counsel. Final Instructions Given to the Jury. CSO Sworn. Alternate Juror Dismissed. Jury Retires to Deliberate. Jury Question answered on the record. JURY VERDICT as to KEVIN ABBOTT (1) Guilty on Count 1,2,3,4. Jury Polled. Verdict Recorded. Defendant has 10 days to

		file post-verdict motions. Defendant is to remain in Custody pending sentencing. Court Reporter: Erica Pratt, Esr. (dt) (Entered: 04/07/2006)
02/07/2008	153	Minute Entry for proceedings held before HONORABLE CYNTHIA M. RUFE. Sentencing Hearing held on 2/5/08 for KEVIN ABBOTT. Counsel and Probation Officer Address the Court. Defendant Sworn. Court Entertains argument on the application of defendant's mandatory minimum sentence. The Court addresses defendant's Objection to Presentence Report. The Court adopts the fact[]s as presented in the revised presentence report with the following correction: Paragraph #44 should read defendant was found guilty on 9-14-00. Sentencing is Continued to a Date to be announced. Court Reporter Erica Pratt, Courtroom Deputy/Esr.(dt) (Entered: 02/07/2008)
02/28/2008	157	MEMORANDUM OPINION AS TO KEVIN ABBOTT OF 2/27/08 THAT THE COURT REJECTS DEFENDANT'S CONTENTION THAT THE SENTENCES IMPOSED FOR CONVICTION ON

		COUNT 3 AND COUNT 4 CAN RUN CONCURRENTLY. NOW, HAVING SETTLED THAT THE COURT IS STATUTORILY MANDATED TO RUN THE MANDATORY SENTENCES FOR COUNTS 3 AND 4 CONSECUTIVELY, THE COURT WILL CALCULATE ABBOTT'S FINAL SENTENCE PURSUANT TO AN ANALYSIS UNDER 18 U.S.C. 3553(a) AND THE MANDATORY MINIMUM SENTENCES TO BE IMPOSED AT THE NEXT SCHEDULED SENTENCING HEARING. SIGNED BY JUDGE CYNTHIA M. RUFE. 2/28/08 ENTERED AND COPIES FAXED AND E-MAILED. (DT) (Entered: 02/28/2008)
02/28/2008	159	JUDGMENT OF 2/28/08 AS TO KEVIN ABBOTT (1), Count(s) 1, 120 MONTHS IMPRISONMENT; 8 YEARS SUPERVISED RELEASE; Count(s) 2, 120 MONTHS IMPRISONMENT TO RUN CONCURRENTLY TO COUNT 1; 8 YEARS SUPERVISED RELEASE; Count(s) 3, 60 MONTHS IMPRISONMENT TO RUN CONSECUTIVELY TO COUNTS 1,2,& 4; 5 YEARS SUPERVISED RELEASE; Count(s)

		4, 180 MONTHS IMPRISONMENT TO RUN CONCURRENTLY TO COUNTS 1 & 2; 3 YEARS SUPERVISED RELEASE; FINE $2,000.00, SPECIAL ASSESSMENT $400.00 as to all CTS. SIGNED BY JUDGE CYNTHIA M. RUFE. 2/28/08 ENTERED. (DT) Modified on 2/29/2008 (cmc). (Entered: 02/28/2008)
02/28/2008	160	NOTICE OF APPEAL by KEVIN ABBOTT RE: Judgment, Cert. of Service.(AINSLIE, ELIZABETH) Modified on 2/29/2008 (cmc). (Entered: 02/28/2008)

U.S. Court of Appeals
for the Third Circuit
CRIMINAL DOCKET FOR CASE #: 08-1623

UNITED STATES OF AMERICA
v.
KEVIN ABBOTT

Date Filed	#	Docket Text
03/06/2008		CRIMINAL CASE DOCKETED. Notice filed by Mr. Kevin Abbott. (SWM)
07/28/2009		PRECEDENTIAL OPINION Coram: SCIRICA, Chief Judge, SLOVITER and HARDIMAN, Circuit Judges. Total Pages: 24. Judge: HARDIMAN Authoring. (SLC)
07/28/2009		JUDGMENT, Affirmed. No costs shall be taxed. (SLC)
08/31/2009		ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges) denying for Panel Rehearing filed by Appellant Mr. Kevin Abbott; denying En Banc Rehearing filed by Appellant Mr. Kevin Abbott, filed. Hardiman, Authoring Judge. (SLC)

PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT,

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Respondent.

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QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(A) provides, in part, that a person convicted of a drug trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

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JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. J.A. 5. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on August 31, 2009. J.A. 5. Petitioner timely filed a petition for a writ of certiorari, which was granted on January 25, 2010. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 of the United States Code provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.

Section 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

Section 922(g) provides, in pertinent part:

> It shall be unlawful for any person – (1) who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition.

STATEMENT

This case concerns 18 U.S.C. § 924(c)(1)(A), which imposes a consecutive mandatory minimum sentence when a defendant employs a firearm "during and in relation to" a drug trafficking offense or crime of violence. The statute specifically provides, however, that the consecutive mandatory minimum sentence applies "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by *any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added). This provision is commonly referred to as the "except" clause. The question in this case concerns the scope of the "except" clause and the meaning of the phrase "any other provision of law" within that clause.

A. The "Except" Clause

Section 924(c) provides a graduated set of minimum sentences for defendants who use or carry a firearm during and in relation to any crime of violence or drug trafficking offense, or who possess a firearm in furtherance of such a crime. 18 U.S.C. § 924(c)(1)(A). Generally, a defendant convicted under § 924(c) will receive a five-year minimum sentence. 18 U.S.C. § 924(c)(1)(A)(i). If the firearm is brandished, however, the minimum sentence is seven years, § 924(c)(1)(A)(ii), or if the firearm is discharged, ten years, § 924(c)(1)(A)(iii). Longer minimum sentences are provided for certain firearms and for repeat offenses, see §§ 924(c)(1)(B)-(C), and a sentence under § 924(c) must run consecutively to any other prison terms imposed, see § 924(c)(1)(D)(ii).

Under the "except" clause, these minimum sentences do not apply "to the extent that a greater minimum sentence is otherwise provided by" either "this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). The first portion of the clause thus bars imposition of an additional mandatory minimum sentence if the defendant is subject to a longer mandatory minimum sentence under § 924(c). If, for example, a defendant both possesses and brandishes a firearm in connection with a drug trafficking offense or crime of violence, he is subject to the seven-year minimum sentence under § 924(c)(1)(A)(ii) for "brandishing" the firearm, but not also to the five-year minimum sentence under § 924(c)(1)(A)(i) for its "possess[ion]."

This case turns on the meaning of the second half of the "except" clause. That is, what does "any other provision of law" mean? More particularly, the issue here is whether this latter portion of the "except" clause is triggered by greater minimum sentences

provided for the underlying drug trafficking offense or crime of violence or, at the very least, greater minimum sentences provided for possessing the same firearm in the same transaction that gave rise to the § 924(c) conviction.

Congress added the "except" clause to § 924(c) in 1998. See Act to Throttle the Criminal Use of Guns, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). The "except" clause first appeared in a bill Senator Jesse Helms introduced in March 1996. S. 1612, 104th Congress sec. 1 (Mar. 13, 1996). However, it was quickly eliminated from that bill, which ultimately failed in the House. Senator Helms included the "except" clause once again when he reintroduced his bill in January 1997. S. 191, 105th Congress (1997).

Within a month of this renaissance of the "except" clause, the Department of Justice submitted a position letter proposing its own amendments to § 924(c), which omitted the "except" clause entirely. See *United States* v. *Whitley*, 529 F.3d 150, 154 (2d. Cir. 2008) (citing Letter from Andrew Fois, Ass't Att'y Gen., Office of Legis. Affairs to Albert Gore, President of the U.S. Senate (Feb. 25, 1997)). But the "except" clause remained in the legislation that ultimately was adopted by both houses of Congress. 18 U.S.C. § 924(c)(1)(A).

Congress made several other changes to § 924(c) in 1998. The 1998 amendments were introduced primarily in response to *Bailey* v. *United States*, 516 U.S. 137 (1995), which held that convictions under § 924(c) required a showing of "active employment of the firearm by the defendant." *Id.* at 143 (emphasis omitted). See generally *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 1-4, 57-58 (1997); H.R. Rep.

No. 105-344, at 4-6 (1997). The 1998 amendments thus extended the scope of § 924(c) beyond active employment to cover any person "who, in furtherance of any such crime, possesses a firearm." § 1, 112 Stat. at 3469. At the same time, Congress also added offenses for brandishing or discharging the firearm and raised the prison term for repeat offenders from twenty years to twenty-five years. *Ibid.* The language of what is now subparagraph (D) was also changed to account for the fact that federal law no longer permitted suspended sentences. *Id.* at 3469-3470. Congress further provided that the terms imposed under § 924(c) were mandatory minimums.

B. The Charges And The District Court Decision

On September 23, 2004, officers of the Philadelphia Police Department made a controlled purchase of crack cocaine from Michael Grant outside a house that they suspected to contain a drug stash. Pet. App. 3a-4a. During Grant's arrest, the police saw petitioner Kevin Abbott standing in the doorway of the house. *Id.* at 4a. Upon noticing the police, petitioner went inside and slammed the door. Officers then broke down the door, entered the house, and arrested petitioner as he attempted to escape through a kitchen window. *Ibid.* Petitioner was in possession of $617 in cash, a key to the house, a small bag of marijuana, and a false driver's license. *Ibid.* Upon a search of the house, the officers found drugs, drug paraphernalia, and two guns, one hidden in a closet and one behind furniture. *Ibid.*

Grant and Abbott were indicted on four counts: (1) conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846; (2) possession of more than five grams of cocaine base

with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 2; (3) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1) and (c)(2); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Pet. App. 4a-5a. Grant pleaded guilty. Petitioner Abbott went to trial and was convicted on all four charges. *Id.* at 5a.

The district court sentenced petitioner to twenty years' imprisonment. Pet. App. 6a. It imposed a fifteen-year mandatory minimum sentence for violating the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) ("ACCA"), because petitioner had three previous convictions for violent felonies or serious drug offenses. *Ibid.* Over petitioner's objection, the court then imposed a five-year mandatory minimum sentence under § 924(c), which was to run consecutively to the fifteen-year sentence, pursuant to § 924(c)(1)(D)(ii). *Ibid.*[1]

C. The Court of Appeals Decision

Petitioner appealed, challenging, among other things, the legality of imposing the five-year minimum sentence under § 924(c). Pet. App. 2a-3a. The Third Circuit affirmed the sentence, holding that § 924(c)'s "except" clause "refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." *Id.* at 12a.

The court of appeals acknowledged that "it is obvious that the prefatory clause has some limiting

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[1]The district court also imposed two ten-year mandatory minimum sentences for counts one and two, pursuant to 21 U.S.C. §§ 846 and 841(b)(1)(B), which the court ordered to run concurrently with the fifteen-year ACCA sentence. Pet. App. 6a.

effect." Pet. App. 19a. The court held that the limiting effect of the phrase "any other provision of law" was "to allow for additional § 924(c) sentences that may be codified *elsewhere in the future*." *Id.* at 13a (emphasis added). In support of that reading, the court relied on *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006), which held that the "except" clause "provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater minimum consecutive sentence for a violation of § 924(c)." Pet. App. 13a (quoting *Collins*, 205 Fed. Appx. at 197-198). According to the Third Circuit, reading "any other provision of law" to refer to future enactments "ameliorates confusion arising from Congress' failure to state explicitly the offenses to which the prefatory clause refers." *Ibid.*

The court expressly rejected two alternative readings of the "except" clause. First, the court dismissed the argument that "any other provision of law" includes greater minimum sentences imposed for the underlying drug trafficking offense or crime of violence. Pet. App. 14a-15a. The court emphasized that the first part of the "except" clause "refers to, *inter alia*, greater minimum sentences 'provided by this subsection,' not for predicate offenses," *id.* at 14a, and that the minimum sentences in § 924(c) apply "'*in addition to* the punishment provided for' a predicate offense." *Ibid.* Ultimately, the court was hesitant to read "any other provision of law" to cover predicate offenses for fear that this reading "would narrow the scope of § 924(c)" while Congress intended "to broaden the statute's reach through the 1998 amendment." *Id.* at 14a-15a. Therefore, the court concluded that the "except" clause "requires a comparison between the minimum sentences specified in §§ 924(c)(1)(A)(i)-(iii) and (B)-(C), and, *at*

a minimum, others associated with using, carrying, or possessing a firearm—not the predicate offense itself." *Id.* at 14a (emphasis added).

Ultimately, however, the court also refused to read the "except" clause to cover offenses for possessing the same firearm in the same transaction giving rise to the § 924(c) conviction. Pet. App. 16a-20a. The court acknowledged that such a reading would "avoid[] some of the problems" that it had identified with the predicate-offense reading, *id.* at 16a, and that "it would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply." *Ibid.* (quoting *Whitley*, 529 F.3d at 155) (alteration in original).

Nevertheless, the court asserted that such a reading leads "to highly anomalous results." Pet. App. 16a. While the court conceded that this reading would not cause an anomalous result on the facts of this case, *id.* at 17a, it believed that an anomaly would result if petitioner had brandished a firearm. Under those hypothetical circumstances, "a defendant situated identically to Abbott but who was not an armed career criminal would be subject to a harsher minimum sentence than Abbott—ten years for the drug offense plus at least seven consecutive years under § 924(c)." *Ibid.* (emphasis omitted). In making this hypothetical comparison, the court of appeals did not consider Abbott's two additional ten-year mandatory minimum sentences for drug trafficking, under 21 U.S.C. §§ 841 and 846, presumably because the district court—at its discretion—directed those sentences to run concurrently with the others. The court thus reiterated

its conclusion that the "except" clause refers only to "alternative minimum sentences for violations of § 924(c)." *Id.* at 19a-20a.

Petitioner timely filed a petition for rehearing en banc, which was denied on August 31, 2009. Pet. App. 33a-34a.

SUMMARY OF ARGUMENT

I. This case requires only the straightforward application of a bedrock principle of statutory construction: The plain meaning of statutory language should control. The "except" clause in 18 U.S.C. § 924(c) clearly exempts defendants from the mandatory minimum sentences provided in § 924(c)(1) if those defendants receive a higher mandatory minimum sentence under either another subsection in § 924(c) or "any other provision of law." The Third Circuit concluded, in accord with the government's argument, that the phrase "any other provision of law" describes *no* currently existing statutes but instead refers to "§ 924(c) sentences that may be codified *elsewhere in the future.*" Pet. App. 13a (emphasis added). The question in this case, ultimately, is thus whether "any other provision of law" means what it says or whether it essentially means next to nothing, as the court of appeals held and the government advocates.

To ask that question is to answer it. This Court, not surprisingly, has in past decisions held that the term "any" has an expansive meaning, especially when used in the phrase "any other provision of law." There is no reason to believe that Congress meant to give that phrase an exceedingly cramped and highly unusual meaning in the "except" clause. The same phrase is used several places elsewhere in the same

statute, always with a broader meaning in line with its plain language.

Read within the context of § 924(c), the "except" clause clearly encompasses any mandatory minimum sentences that are imposed on defendants because of the criminal transaction that triggered § 924(c) in the first place. Holding that predicate offenses and other firearms offenses trigger the "except" clause would give effect to the plain language of the clause and the obvious purpose of § 924(c) as a whole. That purpose, which is readily apparent from the statutory language, is to ensure that all defendants who use or possess a gun in connection with drug trafficking offenses or crimes of violence receive at least five years in prison.

The court of appeals failed to follow the plain meaning of the "except" clause. It instead construed the simple phrase "any other provision of law" as merely a "safety-valve," with no present application to any existing statutes. The provision, in the court of appeal's view, is simply insurance against the exceedingly remote possibility that Congress might in the future not only create an additional sentence for a § 924(c) offense but do so elsewhere in the United States Code. Thus, "any other provision of law," according to the court of appeals, actually means either "no provision of law" or "a highly specific and unusual provision of law that does not yet exist and may never be enacted." This reading of the statute is startlingly implausible and renders the phrase "any other provision of law" largely meaningless.

The court justified its departure from the plain meaning by asserting the need to avoid some hypothetical sentencing anomalies that might arise when a more culpable defendant receives a lower mandatory minimum sentence than a less culpable

defendant. Avoiding anomalies, however, is not a justification for rewriting a statute or ignoring its plain language. Courts have neither the responsibility nor the proper authority to correct what they might perceive as drafting errors or to improve, in their eyes, the effectiveness of the statutes that Congress has actually passed. Following the plain language of the "except" clause, in any event, does not require anomalous results for the simple reason that only *minimum* sentences are involved, and district courts have always had the ability to increase the sentences of the more culpable defendants to eliminate any imagined or potential anomalies.

The plain language supports petitioner in this case. Even if it did not, the most that could be said in the government's favor is that the statutory language is ambiguous. One could not seriously claim that the phrase "any other provision of law" *unambiguously* refers *only* to laws that might or might not be enacted in the future, which is the interpretation proffered by the government below and accepted by the court of appeals. Because the government's interpretation, to put it mildly, is not unambiguously correct, the rule of lenity must be applied if this Court does not agree that the plain language supports the petitioner's position in this case. Applying the rule of lenity leads to the same outcome that petitioner believes is commanded by the plain language: The "except" clause must apply to all sentences that arise from the same criminal transaction.

II. If the "except" clause is not read to apply to all sentences that arise from the same criminal transaction that triggered § 924(c), at the very least it must apply to all other mandatory minimum sentences for firearms offenses, such as petitioner's fifteen-year sentence for firearm possession under 18

U.S.C. § 924(e). Section 924(c) is a firearms statute, which punishes the use or possession of a firearm in connection with a drug trafficking offense or a crime of violence. It follows, as most courts of appeals that have addressed this issue have recognized, that the "except" clause naturally applies to sentences imposed by other firearms statutes.

Applying the "except" clause to other firearms statutes, including the frequently prosecuted § 924(e), prevents "double counting" by ensuring that defendants are not punished twice for using or possessing the same firearm in the same transaction. Limiting the reach of the "except" clause to other firearms statutes also avoids any and all potential anomalies because every defendant would receive the longer mandatory minimum sentence for the use or possession of a firearm, regardless of the sentence received for the predicate offense.

Application of the "except" clause to firearm offenses gives a far more natural reading to the phrase "any other provision of law" than the interpretation favored by the government and the court below. Even were the government's reading of the clause plausible, surely it is not unambiguously correct. One could not fairly conclude that other firearms offenses are unambiguously excluded from the "except" clause. The most one could say, therefore, is that the statute is ambiguous, in which case the rule of lenity should apply and petitioner should prevail.

ARGUMENT

I. THE "EXCEPT" CLAUSE OF 18 U.S.C. § 924(c)(1)(A) SHOULD BE ENFORCED ACCORDING TO ITS PLAIN TERMS, WHICH EXEMPT DEFENDANTS SUBJECT TO LONGER MANDATORY MINIMUMS

This Court has held "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted). It has repeatedly explained that "[i]n determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (internal quotation marks and citations omitted); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). This Court has similarly made clear that courts have a "duty to give effect, if possible, to every clause and word of a statute" so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)) (internal quotation marks omitted).

This Court has repeatedly followed these basic principles when interpreting this very statute and has concluded that the plain language of the statute must control. See, *e.g.*, *United States* v. *Watson*, 552 U.S. 74 (2007) (interpreting the word "use"); *United States* v. *Gonzales*, 520 U.S. 1, 4 (1997) (interpreting the word "any"); *Bailey* v. *United States*, 516 U.S. 137 (1995) (same); *Deal* v. *United States*, 508 U.S. 129

(1993) (interpreting the word "conviction"). Until now, the government has strongly endorsed this approach, arguing in *Gonzales*, for example, that "[t]he language of Section 924(c) is dispositive" and that "where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'" U.S. Br. at 11-12, *Gonzales*, 520 U.S. 1 (No. 95-1605) (internal quotations omitted).

In this case, however, the government has proffered an interpretation of § 924(c) that distorts the plain language of the text and renders a portion of the statute insignificant at best and superfluous at worst. The Third Circuit agreed with the government's argument below that the phrase "any other provision of law" does not mean what it says but instead refers to "§ 924(c) sentences that may be codified *elsewhere in the future*." Pet. App. 13a (emphasis added); U.S.C.A. Br. 35-36. In other words, according to the Third Circuit's holding, "any other provision of law" actually means either: (1) "no provision of law" or (2) "a highly specific and unusual provision of law that does not yet exist and may not ever be enacted." This cannot be correct.

A. The Text of § 924(c) Clearly Establishes That A Defendant Already Facing A Greater Minimum Sentence For The Same Criminal Transaction Should Not Receive Additional Mandatory Punishment Under § 924(c)(1)(A)

1. "Any Other Provision Of Law" Means What It Says

The Third Circuit's strained and highly implausible interpretation is especially puzzling because the meaning of the "except" clause is quite plain. Section 924(c)(1) provides that a defendant who uses or possesses a firearm in relation to a drug trafficking crime or crime of violence will serve at least five years in prison, more if he brandishes or discharges the weapon. By virtue of the "except" clause, however, the mandatory minimum sentences imposed by § 924(c)(1) simply do not apply if "a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

This clause contains nothing but simple phrases. It is devoid of technical legal terms. And it uses only words that have well-understood meanings. Indeed, the first half of the "except" clause, which includes its most arguably legalistic aspect—"this subsection"—is not even in dispute. It has rightly been taken to mean the other provisions of § 924(c). See Pet. App. 12a-13a. See generally *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004). For example, a criminal who brandishes a firearm will not receive both the seven-year sentence prescribed by § 924(c)(1)(A)(ii) and the five-year sentence under § 924(c)(1)(A)(i) for possessing the same firearm.

The second half of the clause—"or any other provision of law"—should present no more difficulty. The word "or" is a "function word to indicate * * * choice between alternative things, states, or courses." Webster's Third New International Dictionary 1585 (1976). The word "any" means "one selected without restriction." *Id.* at 97. Therefore, the phrase "or any other provision of law" means a provision of law, *other than* § 924(c), selected without restriction. Put differently, it means every other law *but* § 924(c).

In *Gonzales*, this Court interpreted a similarly straightforward provision in § 924(c) and concluded that the statute should be enforced according to its plain terms. 520 U.S. at 5-11. The question in that case concerned the meaning of 18 U.S.C. § 924(c)(1)(D)(ii), which provides that a defendant's § 924(c) sentence "shall [not] run concurrently with *any other term of imprisonment* imposed on the person." In interpreting the meaning of "any other term of imprisonment," this Court made clear that the term "any * * * [r]ead naturally * * * has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (citing Webster's Third New International Dictionary 97 (1976)); *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1 (1870)). The Court went on to conclude, essentially, that "any" means "any," agreeing with the government that the word "leaves no doubt as to the Congressional intention to include all members of the category identified by the enactment." U.S. Br. at 11-12, *Gonzales*, *supra* (No. 95-1605) (citing, *inter alia*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980); *NAACP* v. *New York*, 413 U.S. 345, 353 (1973); *United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945)) (internal quotation marks omitted).

This Court reached the same conclusion more recently, when interpreting the precise phrase at issue in this case. See *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). In *Beaty*, this Court considered 28 U.S.C. § 1605(a)(7) and concluded that "the word 'any' (in the phrase 'any other provision of law') has an 'expansive' meaning, giving us no warrant to limit the class of provisions." *Ibid.* (internal citations omitted). There is no reason to believe that Congress intended to give the word "any" a less expansive meaning in § 924(c), particularly given the contrast between that open-ended term and the reference to "this subsection" that immediately precedes it.

Reading "any other provision of law" to mean what it says would also comport with the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (citing *Dep't of Revenue of Ore.* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)) (internal quotation marks omitted); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006) ("Generally, 'identical words used in different parts of the same statute are * * * presumed to have the same meaning.'") (quoting *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005)). The phrase "any other provision of law" is used six times in § 924, three times within § 924(c) alone.[2] There is no indication that the phrase is ever used to express anything other than what it plainly says.

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[2]See 18 U.S.C. §§ 924(a)(4) (using the phrase twice), (c)(1)(A), (c)(1)(D), (c)(5), and (e)(1).

Section 924(c)(1)(D), for example, provides that a defendant's sentence under § 924(c) must run consecutively to a defendant's other sentences, "[n]otwithstanding *any other provision of law*." There is no reason to believe that "any other provision of law" in § 924(c)(1)(D) actually means either "no provision of law" or "a highly specific and unusual provision of law that does not yet exist and may not ever be enacted." The same is true of § 924(c)(1)(A).

It is especially appropriate in this case to presume that Congress meant the word "any" in the phrase "any other provision of law" to have the same expansive meaning given the word in *Gonzales*, because Congress created the "except" clause within months of the Court's decision in that case, which interpreted the same statute. See *Merrill Lynch*, 547 U.S. at 85-86 (reasoning that the presumption of consistent meaning is particularly powerful when Congress adopts the term subsequent to judicial interpretation of the same statute). In 1998, Congress knew that, unless it specifically declared otherwise, "any" meant "any."

2. Defendants Who Receive Higher Minimum Sentences For Offenses Committed During The Same Criminal Transaction Are Covered By the "Except" Clause

As the Second Circuit has recognized, enforcing the plain meaning of the phrase "any other provision of law" does not leave the "except" clause "unbounded." *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009). The "except" clause refers to "a greater minimum sentence" that is "*otherwise provided*" by "any other provision of law." See 18 U.S.C. § 924(c)(1)(A) ("Except to the extent that a

greater minimum sentence is *otherwise provided* by this subsection or by any other provision of law") (emphasis added). The phrase "otherwise provided" confirms what common sense suggests, namely that the "except" clause is not triggered by the mere existence of other laws establishing mandatory minimum sentences that are higher than those imposed by § 924(c).

A defendant would not be exempt from § 924(c), for example, simply because a higher mandatory minimum sentence exists in the United States Code for a crime the defendant did not commit. Indeed, if that were the case, § 924(c) would effectively be meaningless, because higher minimum sentences than those mandated by § 924(c) existed within the United States Code when the "except" clause was added to the statute. The "except" clause must therefore refer to sentences that could actually be applied to a defendant subject to § 924(c); the higher minimum sentence "otherwise provided," in other words, must be a sentence "provided" by a law that applies to *this* defendant.

Read in the context of the entire statute, moreover, the phrase "otherwise provided * * * by any other provision of law" naturally encompasses those sentences that apply to defendants as a result of the conduct described in § 924(c). Put differently, the "except" clause, as the Second Circuit has concluded, certainly applies when a defendant faces a longer mandatory minimum for a crime committed in the same criminal transaction that triggered § 924(c) in the first place. See *Williams*, 558 F.3d at 171-172 (concluding that the "except" clause applies to defendants who receive longer mandatory minimums

for counts "arising from the same criminal transaction or operative set of facts").[3]

The reason is simple. The language of § 924(c) as a whole, including the "except" clause, makes clear its purpose: to ensure that a defendant receives at least five years in prison as a result of using or possessing a gun in connection with a violent crime or drug trafficking offense. If the same defendant receives more than five years' imprisonment because another statute, triggered by the same criminal transaction, imposes a higher mandatory minimum, the plain language and obvious purpose of § 924(c) are satisfied. It follows, therefore, that higher mandatory minimum sentences imposed for the use or possession of firearms, drug trafficking offenses, or crimes of violence all trigger the "except" clause.

The Second and Sixth Circuits have both recognized as much and have given the terms of the "except" clause their plain meaning. In a case very similar to this one, the Second Circuit held "the consecutive minimum ten-year sentence * * * inapplicable to [defendant] Whitley because he was subject to a higher fifteen-year minimum sentence as an armed career criminal." *United States* v. *Whitley*, 529 F.3d 150, 151 (2008); see also *Williams*, 558 F.3d

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[3]The Second Circuit's transactional approach, see *Williams*, 558 F.3d at 171-172, follows the ordinary understanding of sentencing policy as it existed when Congress was drafting the "except" clause. By 1998, when the "except" clause was added to § 924(c), the Guidelines had already long required a sentencing judge to consider the criminal transaction that brought the defendant before her, including both the defendant's charged and uncharged conduct. Sentencing Guidelines Ch. 1, Pt. A (1997). As such, it would make sense for Congress to have instructed that judge not to apply an additional five-year sentence when the defendant is subject to another mandatory minimum for another crime within the same transaction.

at 170-175. Earlier this year, the Sixth Circuit similarly held that the "statutory language plainly forbade the imposition of the mandatory minimum contained in the firearm statute [§ 924(c)] in conjunction with another greater mandatory minimum sentence." *United States* v. *Almany*, 598 F.3d 238, 242 (6th Cir. 2010). Both courts thus held that if a longer mandatory minimum was "otherwise provided" for a particular defendant, § 924(c) did not require that an additional mandatory five years be added to that longer sentence.

B. The Third Circuit's Interpretation Of The "Except" Clause Distorts The Plain Meaning Of The Statute And Renders Half Of The "Except" Clause Surplusage

The Third Circuit's opinion below pays lip service to the notion that "[a]s in all cases of statutory interpretation," the "inquiry begins with the language of the statute." Pet. App. 8a. But it goes on to treat a deliberately drawn statutory provision as "a slip of the legislative pen, * * * the result of inartful draftsmanship," rather than "a conscious and not irrational legislative choice." *Bifulco* v. *United States*, 447 U.S. 381, 400-401 (1980). Indeed, the court of appeals ignored both the language of the "except" clause itself and this Court's command that "a rule nowhere contained in the text" should not "do the bulk of that provision's work, while a proviso accounting for * * * [much] of that text would lie dormant in all but the most unlikely situations." *TRW Inc.*, 534 U.S. at 31.

The court below asserted that "[r]ead in context, the most cogent interpretation is that the ["except"] clause refers only to other minimum sentences that

may be imposed for violations of § 924(c), not separate offenses." Pet. App. 12a. This interpretation is clearly correct for the first half of the "except" clause, which refers to greater minimum sentences "provided by this subsection." But it gives no meaning to the second half of the "except" clause, which refers to "any other provision of law."

The Third Circuit's response to this obvious problem was that the "except" clause serves as a mere "'safety-valve,'" to allow "for additional §924(c) sentences that may be codified *elsewhere in the future*." Pet. App. 13a (quoting *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001)) (emphasis added). In other words, the sole purpose of the "except" clause, according to the court of appeals, is to guard against the possibility that Congress *might*, sometime in the *future*, create a longer mandatory minimum sentence for § 924(c) offenses but do so *somewhere else* in the United States Code. This reading of the statute is startlingly implausible.

1. For starters, just last Term, this Court unanimously refused to read an analogous statutory trigger in a way that left the provision "with little, if any, meaningful application." *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2299, 2301 (2009); see also *TRW*, 534 U.S. at 31 (noting a court's obligation to construe a statute so its language is not "insignificant"). In *Nijhawan*, 129 S. Ct. at 2297, the Court interpreted a statutory provision that defined an "aggravated felony" for purposes of a deportation statute. Offenses that counted as "aggravated felonies" thus triggered deportation, much like sentences that arise from "any other provision of law" trigger the "except" clause in this case.

This Court squarely rejected a reading that would have resulted in the statutory trigger applying,

somewhat awkwardly, to just a few existing federal statutes and to eight state laws. *Nijhawan*, 129 S. Ct. at 2301-2302 (observing further that the rejected reading of the statutory trigger made it apply most naturally to "nonexistent statutes"). The Court refused to "believe Congress would have intended [the statutory trigger] to apply in so limited and so haphazard a manner." *Id.* at 2302; accord *United States* v. *Hayes*, 129 S. Ct. 1079, 1087-1088 (2009) ("Given the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend [18 U.S.C.] § 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.").

Notably, the government in *Nijhawan* argued against construing statutory language in a way that would give the relevant provision very little present effect. The government colorfully stressed that such an interpretation "would effectively mean that Congress had used an elephant-sized hole to house a mouse." U.S. Br. at 30, *Nijhawan*, *supra* (No. 08-495); see also *Whitman* v. *American Trucking Ass'ns, Inc.*, 931 U.S. 457, 468 (2001) ("Congress * * * does not, one might say, hide elephants in mouseholes."). That conclusion would apply *a fortiori* to the government's proposed construction in this case.

By its own reckoning—and that of the Third Circuit as well—the "safety-valve" interpretation would apply the statute not to "a handful" of federal offenses, U.S. Br. at 11, *Nijhawan*, 129 S. Ct. 2294 (No. 08-495), but to *no* offenses currently on the books. Pet. at 12-13, *United States* v. *Williams* (2009) (No. 09-466). Given that the phrase "any other provision of law" is even more generic than

"aggravated felony," effectively the government is now arguing that Congress used a whale-sized hole to house a mouse that may or may not exist at some point in the future. Put another way, the phrase "any other provision of law" is simply too broad an instrument for the very limited purpose ascribed to it by the government and the Third Circuit.

2. More fundamentally, the Third Circuit read the simple phrase "any other provision of law" to have a remarkably complicated—not to mention convoluted—meaning. For the Third Circuit's "safety-valve" interpretation to be correct, in 1998 Congress must have anticipated not only that at some point its successors would create a new, duplicative penalty for a "violation[] of § 924(c), not separate offenses," but that a future Congress would do so somewhere other than in § 924(c) itself. Pet. App. 12a. Under this farfetched scenario, the 1998 Congress would have simultaneously amended the well-established and oft-revisited statutory framework of § 924(c) while imagining that future legislators might well abandon this framework by effectively amending § 924(c) somewhere else in the United States Code.

But that is not all. For the "safety-valve" interpretation to make sense, in 1998 Congress must also have anticipated that this future Congress would create a longer mandatory minimum sentence for § 924(c) violations without making any mention of the new provision's interaction with § 924(c) itself.[4] It is hard to imagine the 1998 Congress endorsing such a

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[4]If a future Congress *were* to indicate clearly how its new provision interacted with § 924(c), its wishes would control and the "except" clause would be irrelevant. See *Washington* v. *Miller*, 235 U.S. 422, 428 (1914) (citing *Townsend* v. *Little*, 109 U.S. 504 (1883)); 2A N. Singer, *Sutherland on Statutory Construction* § 47.13 (2007).

robust view of future legislative incompetence by insuring so heavily against the remote possibility of future error.

The utter implausibility of this interpretation becomes even clearer when one considers the constitutional norms that already serve the purpose ascribed to the "except" clause by this "safety-valve" interpretation. Recall that the Third Circuit asserts that the "except" clause refers "only to other minimum sentences that may be imposed for violations of § 924(c), *not separate offenses*." Pet. App. 12a (emphasis added). The Double Jeopardy Clause, U.S. Const. amend. V, cl. 2, however, already prevents Congress from carelessly creating such duplicative punishments.

This Court's double jeopardy precedents make clear that for this hypothetical future Congress to subject a defendant to multiple punishments for both § 924(c) and its later-born clone, Congress would have to "specially authorize[]" duplicative punishment. *Missouri* v. *Hunter*, 459 U.S. 359, 366-367 (1983); *Whalen* v. *United States*, 445 U.S. 684, 693 (1980); *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221-222 (1952). If Congress made clear its intent to authorize duplicative punishment, the "except" clause would effectively be overridden. If, on the other hand, Congress enacted the new penalty but remained silent about the old law, the defendant could not be sentenced under both the old and new versions of the same § 924(c) offense, which would mean that the "except" clause would be irrelevant. Thus, under the "safety-valve" reading, not only does one half of the "except" clause currently have no meaning, it is also exceedingly unlikely to have any meaning in the future. Indeed, for the "except" clause ever to have any meaning at all under the Third

Circuit's "safety-valve" reading, Congress would somehow have to refer back to § 924(c) so as to "specially authorize[]" the duplicative punishment, without in the process explaining how the two statutes interacted.

In sum, the "safety-valve" reading of the statute would reduce the phrase "any other provision of law" to an unnecessary precaution against vanishingly unlikely future legislative action. Just as in *Nijhawan*, 129 S. Ct. at 2302, this Court should reject a statutory construction that would leave the relevant provision with "little, if any, meaningful application."

C. Enforcing The Plain Language Of The "Except" Clause Is Consistent With The Legislative History

Given that the text of § 924(c) is unambiguous, it is not necessary for this Court to examine the provision's legislative history. *Gonzales*, 520 U.S. at 6. Nonetheless, doing so demonstrates that the government is asking this Court to provide it with a statute that Congress refused to enact.

1. The Justice Department never supported including the "except" clause in § 924(c). It sought to amend § 924(c) to cover possession of a firearm in furtherance of a crime of violence without exception. See *Whitley*, 529 F.3d at 154 (citing Letter from Andrew Fois, Ass't Att'y General, Office of Legis. Aff., to Albert Gore, President of the U.S. Senate (Feb. 25, 1997)). But the "except" clause remained in the

legislation that was ultimately adopted by both houses of Congress.[5]

The government has sought for ten years to reverse this legislative choice by attempting to persuade courts to essentially remove the "except" clause from § 924(c). The government has, over time, offered a variety of reasons as to why the "except" clause should be excised. It has claimed, for example, that the clause was included merely as a grammatical necessity given the other changes made in the 1998 amendments. *Whitley*, 529 F.3d at 153-154. The Second Circuit correctly rejected that explanation as patently wrong—not to mention in serious tension with the fact that the government's proposed amendments did not include an "except" clause. *Ibid.*

2. The government has also suggested that the "except" clause is inconsistent with the purpose behind the 1998 amendments. This, too, is incorrect. To begin, "[t]he best evidence of [Congress'] purpose is the statutory text adopted by both houses of Congress and submitted to the President." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Further, the premise of the government's argument—that Congress sought only to increase penalties—is simply unproven. Indeed, the premise effectively assumes the answer to the question.

A closer look at the legislative history indicates, as does the plain language of the "except" clause, that Congress was not acting with the single-minded

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[5]This was just one of several proposals to amend § 924(c) considered in during this period, all of which were aimed at a similar purpose but were rejected in favor of S. 191. *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 10 (1997) (listing four separate Senate bills (S. 362, S. 3, S. 191 and S. 15) without discussing other corresponding proposals circulating in the House).

purpose of increasing minimum sentences to the hilt. To the contrary, the immediate motivation for the amendments was to respond to this Court's holding in *Bailey* v. *United States*, 516 U.S. 137 (1995). Congress sought to clarify its intent that § 924(c)'s minimum penalties extended to possession of a weapon in furtherance of a crime of violence or drug trafficking. See, *e.g.*, 144 Cong. Rec. H10330 (1998) (statement by Rep. McCollum). Including an "except" clause obviously does not interfere with the accomplishment of this purpose, nor is it inconsistent with it.

Rather, the legislative history shows that the inclusion of the "except" clause was an integral part of a measured approach to § 924(c). The 1998 bill as adopted was fundamentally a compromise. 144 Cong. Rec. H10330 (1998) (statement of Rep. McCollum) (describing the bill as "considerably different from the House version and different from the Senate version as well"). Over its two-year journey, the bill went through a host of changes, but the mandatory minimums and the "except" clause travelled in tandem. S. 1612, 104th Congress sec. 1 (Mar. 13, 1996) (including both a sentencing table and the "except" clause); S. 1612, 104th Congress sec. 1 (Oct. 4, 1996) (including neither); cf. *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. 38 (1997) (statement of Thomas G. Hungar, former Ass't to the Solicitor General) (stating that the "except" clause in the reintroduced version eliminates "any potential inconsistency with other statutes"). Nevertheless, up to the very date of passage, there was concern that even with the "except" clause, § 924(c) could cause minor drug dealers to be sentenced more harshly than those convicted of aggravated assault, voluntary

manslaughter, and rape. 144 Cong. Rec. H10330 (1998) (statement of Rep. Scott).

This history shows Congress undoubtedly wanted to send the signal to defendants that "[i]f you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sen. Helms); see also 144 Cong. Rec. H10330 (1998) (statement of Rep. Myrick) ("S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face *a* mandatory sentence.") (emphasis added). But there are likewise indications that Congress sought to avoid excessive punishment, and even the court below acknowledged that "it would be logical" for Congress to make a judgment not to impose duplicative minimum sentences. Pet. App. 16a. Adopting the plain meaning of the "except" clause discussed above accomplishes Congress's goal of punishing firearm possession and use without undoing a carefully drawn legislative compromise.

D. Avoiding Hypothetical Sentencing "Anomalies" Does Not Justify Ignoring The Plain Meaning Of § 924(c)

The court of appeals reasoned that "anomalous" results would occur if predicate offenses were included within the "except" clause, and it relied on those supposed anomalies to justify applying the clause only to *future codifications* of § 924(c) offenses. Pet. App. 15a-16a. The court offered the hypothetical case of two defendants, *A* and *B*. *A* commits a drug trafficking offense with a minimum sentence of seven years; *B*, meanwhile, commits a more serious drug

trafficking offense with a minimum sentence of ten years. *Id.* at 15a. Should both *A* and *B* brandish firearms in the course of their offenses in violation of § 924(c), the court reasoned, *A* would be sentenced under both minimums for a total sentence of fourteen years, while the "except" clause would subject the more culpable *B* to only ten years' imprisonment. *Ibid.* For several reasons, the Third Circuit's reasoning is flawed.

1. First, a court may depart from the plain meaning of a statute only when such a reading would yield *absurd* results, not merely *anomalous* ones. *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995) (stating that a "patent absurdity" might justify departure from plain language); see *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (finding a result to be "absurd" when supported by "no plausible reason"). The court of appeals, however, suggested that the absurdity canon was implicated if the results were merely anomalous, which is simply not correct. See Pet. App. 16a-18a.

In doing so, the court below ignored this Court's consistent distinction between mere anomalies and true absurdities—and its admonishment that when merely the former arise, it falls to Congress to correct them. For instance, in *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court acknowledged that a seeming anomaly resulting from its interpretation of 28 U.S.C. § 1367 may have been the result of an "unintentional drafting gap," but explained that "if that is the case, it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd." *Id.* at 565; see also *Shady Grove Orthopedic Assocs., P. A.* v. *Allstate Ins. Co.*, No. 08-1008 (Mar. 31, 2010), slip op. 21 n.13 (opinion of Scalia, J.) ("The possible

existence of a few outlier instances does not prove [a prior decision]'s interpretation is absurd. Congress may well have accepted * * * anomalies as the price of a uniform system of federal procedure.").

The sentences resulting from a natural reading of the "except" clause hardly are without "plausible reason." As the Second Circuit has correctly explained, while one purpose of § 924(c) is to increase penalties for firearms offenses, it is not "inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply." *Whitley*, 529 F.3d at 155. This, in fact, would be an "e[illegible]ntly sound" and logical scheme. *Ibid.*[6] The sche[illegible] is not rendered illogical by the fact that in some "outlier instances," *Shady Grove*, slip op. 21 n.13 (opinion of Scalia, J.), some less culpable defendants might receive a higher mandatory *minimum* sentence, for the simple reason that the more culpable defendants can still receive a longer total sentence. See *infra* at 30-32.

Moreover, sentencing schemes need not possess precisely tuned gradients. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("That distributors of varying degrees of culpability might be subject to the

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[6]Giving § 924(c) its natural reading also would comport with congressional intent in prior amendments to § 924(c). As this Court has explained, Congress has not sought to lengthen penalties "to the hilt" in prior amendments, which "set a variety of limits * * * on the available punishment." *Busic* v. *United States*, 446 U.S. 398, 408 (1980). The addition of the "except" clause in 1998 similarly reflects this "not unbounded" desire to deter firearms abuses. *Ibid;* see *supra* at 24-27.

same sentence does not mean that the penalty system for LSD distribution is unconstitutional."); *Harmelin* v. *Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("The debate [over the wisdom of mandatory sentencing statutes] illustrates that * * * arguments for and against particular sentencing schemes are for legislatures to resolve."). A sentencing scheme, for example, "does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *City of Dallas* v. *Stanglin*, 490 U.S. 19, 26-27 (1989). Indeed, just as the Sentencing Guidelines do not "work deductively to establish a simple and perfect set of categorizations and distinctions," Sentencing Guidelines Ch. 1, Pt. A, intro. comment, neither must statutory minimum sentences.

Even if the Third Circuit's hypothetical would produce the suggested result (which, as we explain below, is a dubious proposition), that anomaly is at best a mild one and of the sort that exists in other statutes, not to mention in § 924(c) itself. Compare 18 U.S.C. § 924(c)(1)(A) (providing a longer mandatory minimum sentence for defendants who discharge rather than simply possess a firearm) with 18 U.S.C. § 924(c)(1)(B) (failing to provide a longer mandatory minimum sentence for those who discharge rather than simply possess a short-barreled rifle). Following the plain language of the statute here thus does not bring one even close to the threshold of absurdity.

2. In any event, the natural reading of § 924(c) does not, in fact, require anomalous results. That is because the sentences enumerated in § 924(c) are *minimums* rather than maximums. As the Second

Circuit has explained, "no court would be *required* to sentence" the more culpable defendant to the shorter sentence. *Whitley*, 529 F.3d at 155. Under the hypothetical scenario laid out by the court below, trial courts could simply exercise their authority under 18 U.S.C. § 3553(a) to increase the sentence for the predicate offense committed by the more culpable defendant, up to the applicable statutory maximum. *Ibid.*[7]

The purported anomaly thus rests on an improper comparison between the two hypothetical offenders' *statutory minimum* sentences. But the statutory minimum is only the beginning point of criminal sentencing. The proper comparison is between their total sentences, which would include the more culpable offender's enhancements under the Sentencing Guidelines. For example, the guidelines in effect when petitioner was sentenced, just like the guidelines today, specify a two-level increase in the base offense level for drug trafficking offenses when the defendant possesses a firearm. See Sentencing Guidelines § 2D1.1(b)(1) (2006); accord § 2D1.1(b)(1) (2009). Once this enhancement is considered, the purported anomaly evaporates. See also Sentencing Guidelines § 2K2.1(b)(6) (2009) (providing a four-level enhancement for defendants who use or possess a firearm during a crime of violence).

Consider an offender who has a base offense level of 30 and falls into Category VI, resulting in a guidelines sentence of 168 to 210 months. A firearms

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[7]Where, as here, the defendant is convicted of multiple offenses, a trial court may also avoid anomalies by ordering the sentences for those offenses to run consecutively rather than concurrently. See 18 U.S.C. § 3584. If the "except" clause is interpreted alternatively to apply only to firearms statutes such as ACCA, such multiple offenses will always be present. See *infra* at 43-44.

enhancement would place him at level 32 for a sentence of 210 to 262 months. If the district court sentences at the top of the guidelines range on the assumption that this defendant is (as the hypothetical presumes) more culpable than similarly situated defendants who will receive longer minimum sentences, the enhancement generates up to an additional 52 months of imprisonment—more than enough to offset the four-year "anomaly" in the Third Circuit's hypothetical.[8] And as the base offense level increases, the purported anomaly becomes even less of an issue because of the greater terms of imprisonment at higher base levels.

The court below suggested that leaving the possibility of additional prison terms to sentencing judges cannot shed light on Congress's intent in 1998 because sentencing judges lacked such discretion until this Court's subsequent decision in *United States* v. *Booker*, 542 U.S. 220 (2005). Pet. App. 18a. But that argument fails to account for the Sentencing Guidelines that were in place in 1998. First, the above-mentioned sentencing enhancements for firearm possession existed in 1998. See Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(5) (1998). Second, the Guidelines, as they existed in 1998, provided that "[i]f a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range." Sentencing Guidelines § 5K2.6 (1998). Thus, even if the enhancements did not themselves eliminate a sentencing disparity, the court could do so by an upward departure. This policy statement is still in

[8]This example utilizes the 2006 guidelines, under which petitioner was sentenced.

place today. See Sentencing Guidelines § 5K2.6 (2009).

Reading the "except" clause by its plain terms therefore asks no more of trial courts than the Sentencing Guidelines already do. Indeed, the government itself argued in favor of a similar scheme in *Chapman*, pointing out that the penalty scheme for LSD distribution is "not * * * draconian or inflexible" because departures under the Sentencing Guidelines "can soften the effects of a rigid sentencing structure" in appropriate cases. U.S. Br. at 36-37, *Chapman*, 500 U.S. 453 (No. 90-5744).

3. Even without considering the sentencing discretion of trial courts, the purported anomaly rarely would materialize in practice. Before such an anomaly could come about, at least three conditions must be present. First, the defendant's predicate offense must be one with at least two gradients of severity—this is necessary to create the possibility of two different sentences for two different defendants. Second, the sentence for the less serious version of the offense must be equal to or less than the § 924(c) sentence—otherwise, both offenses would trigger the "except" clause. And third, the sentence for the more serious version of the offense must be greater than the § 924(c) sentence—otherwise, neither offense would trigger the "except" clause.

The reasoning of the court below rests on the unique situation in which all three conditions occur. Yet statutes are designed to operate in the run of cases, and this Court should not twist the plain language of the statute to account for the isolated hypothetical situation the court below imagined. Cf. *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 41-42 (1928) (Holmes, J., dissenting) ("If [a statutory scheme] is right as to the run of cases, a possible

exception here and there would not make the law bad."). Indeed, this Court's most recent pronouncement on this very statute warns against the use of "[f]anciful hypotheticals" as a reason to "contort[] and stretch[] the statutory language." *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (declining to insert into § 924(c)(1)(A)(iii) a separate proof of intent requirement for the discharge of a firearm).

4. "In any event," as the Second Circuit has rightly explained, "this purported anomaly results from what, in our view, is a plain reading of the statutory text. 'If, at the end of the day, Congress believes we have erred in interpreting [the statute], it remains free to correct our mistake.'" *Williams*, 558 F.3d at 175 (quoting *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 246 (1995) (O'Connor, J., concurring in part and dissenting in part)). It is not this Court's "province to rescue Congress from its drafting errors, and to provide for what we might think * * * is the preferred result." *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring). The argument that Congress did not foresee anomalous applications of § 924(c) is no answer to this point: "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985).[9]

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[9]See also *Comm'r* v. *Corell*, 339 U.S. 619, 625 (1950) ("[W]e cannot reject the clear and precise avenue of expression actually adopted by the Congress because in a particular case we may know, if the bonds are disposed of prior to our decision, that the public revenues would be maximized by adopting another statutory path.").

E. Any Remaining Ambiguity Must Be Resolved In Favor Of The Defendant

The plain language of the statute supports petitioner. Even if did not, however, it can hardly be said that the *government's* reading of the statute is obviously correct, as the government has implausibly argued that the statutory provision at issue is essentially meaningless. Indeed, the government itself has offered different interpretations of the "except" clause over time, see *infra* at 37-39, and has acknowledged the possibility "that no reading of the statute's language is actually plain." See U.S. C.A. Br. at 37. Unless "the Government's position is unambiguously correct [this Court] applies the rule of lenity," *Granderson*, 511 U.S. at 54, and must resolve any ambiguities in favor of petitioner. It is a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

Though ignored by the decision below, the rule's relevance to this case is clear. Two circuit courts have relied on the plain meaning of § 924(c) to hold that the "except" clause includes predicate offenses. *Almany*, 598 F.3d at 242; *Williams*, 558 F.3d at 170-174, 176. Two other circuit courts, in contrast, have relied on the statute's plain language to hold that it does not include predicate offenses. *United States* v. *Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009); *United States* v. *Alaniz*, 235 F.3d 386 (8th Cir. 2000). A circuit split alone does not prove ambiguity, obviously, though it is noteworthy that four courts have disagreed so sharply on what the plain statutory language commands. More importantly, the fact that two courts of appeals have relied, persuasively, on the plain language of the statute to conclude that the

"except" clause includes predicate offenses makes it quite difficult to conclude that the government's reading of the clause, which would exclude such offenses, is unambiguously correct.

Further, the decision below respects neither of the fundamental values served by the rule of lenity. Lenity stresses that criminal defendants should receive "fair warning * * * of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). In addition, given the "seriousness of criminal penalties * * * legislatures and not courts should define criminal activity." *Ibid.*

If § 924(c) is taken to impose an additional mandatory minimum for criminal defendants already subject to a higher minimum, the "common world" would not have had fair warning. *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). Even if this Court concludes that there is ambiguity, the common world would have seen clear language eliminating § 924(c)'s mandatory minimum. What is more, to clarify any congressional ambiguity and subject a defendant in petitioner's position to an additional mandatory minimum would be to impose judicially an additional punishment that Congress failed to set forth clearly.

Whatever else the rule of lenity means, surely it requires that courts not *create* an ambiguity and then resolve it *to the detriment* of criminal defendants. See *Whitley*, 529 F.3d at 156 (noting the oddity of "rejecting the literal meaning of statutory language to the detriment of a criminal defendant"). This would turn the rule of lenity on its head.

II. AT A MINIMUM, "ANY OTHER PROVISION OF LAW" REFERS TO STATUTES THAT PROVIDE MANDATORY MINIMUM SENTENCES FOR POSSESSING THE SAME FIREARM IN THE SAME TRANSACTION

The only plausible alternative reading of the "except" clause is that it refers to "any other provision of law" outside of § 924(c) that imposes a "greater minimum sentence" for the defendant's possession or use of the same firearm. That interpretation gives effect to the phrase "any other provision of law" and would further the provision's purpose, evident from its text, of punishing firearm use or possession without *double counting* the use or possession of the same firearm in the same transaction. Even among courts of appeals that have concluded that "any other provision of law" does not include predicate offenses, most have acknowledged that the phrase naturally includes offenses based on possession of the same firearm at issue in the § 924(c) count. See, *e.g.*, *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008); *Alaniz*, 235 F.3d at 389.[10]

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[10]The government has recognized that the question whether the "except" clause refers to firearm-related offenses is distinct from the issue whether it applies to predicate offenses. See U.S. Supp. Br. at 8, *Williams*, 558 F.3d 166 (No. 07-2346-cr) ("[R]egardless of whether the 'except' clause should be read to apply to all firearms offenses (as *Whitley* holds) or to the narrower subset of firearms offenses set forth in Section 924(c) (as the Government has argued), it should not be extended to apply to [predicate offenses].").

A. The Text Of The "Except" Clause Dictates That The § 924(c) Minimum Sentence Does Not Apply When A Defendant Is Subject To A Greater Mandatory Minimum Sentence For Possession Of The Same Firearm

At a minimum, it is "obvious" that the phrase "a greater minimum sentence * * * otherwise provided by * * * any other provision of law" can easily be read to encompass minimum sentences imposed for possessing the same firearm. See *Parker*, 549 F.3d at 11. Most of the courts of appeals that have addressed this issue agree that because § 924(c) provides a minimum term of imprisonment for possessing a firearm, the "except" clause naturally includes such offenses codified outside of § 924(c). As the First Circuit explained:

> Section 924(c) dictates an additional minimum sentence for an underlying offense *because* of the presence of the firearm; thus, if "a greater minimum sentence is otherwise provided" *on account of the firearm*, then under the "except clause" that greater minimum might supercede the otherwise applicable *section 924(c)* adjustment.

Ibid. (emphasis added); accord *Whitley*, 529 at 158; *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *Alaniz*, 235 F.3d at 389.

Indeed, the government itself previously read the "except" clause to apply broadly to firearms offenses, at least so long as the sentences for those offenses were consecutive to those imposed for the predicate

offense. In *Whitley*, the government argued that "if some other statutory provision—whether within Section 924(c)(1) *or elsewhere*—provides for an even higher minimum consecutive sentence *for a firearms offense*, then that higher minimum consecutive sentence becomes the mandatory minimum sentence under Section 924(c)." U.S. Br. at 25-26, *Whitley*, 529 F.3d 150 (No. 06-0131-cr) (emphasis added); accord *id.* at 29 (stating that Congress intended "to impose *consecutive* minimum sentences" "for *firearm-related* conduct") (second emphasis added). The *Whitley* court correctly concluded, in rejecting the government's interpretation, that "the word 'consecutive' does not appear in the text of the 'except' clause." 529 F.3d at 153. Nonetheless, the government's interpretation of § 924(c) in *Whitley*—a case decided just two years ago—rightly acknowledges that the "except" clause is naturally read to refer to a variety of existing firearm offenses that carry mandatory minimum sentences.

Application of the "except" clause to firearm offenses gives a far more natural reading to the phrase "any other provision of law" than the government's most recent interpretation. The government now maintains that the expansively worded phrase actually refers to *no* other provision of law, or at least none currently in existence. It reads the "except" clause to apply only to a "greater minimum sentence [aside from § 924(c)] for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense." Pet. at 11-12, *Williams, supra* (No. 09-466); see also U.S. Pet. for Reh'g En Banc at 7-8, *Whitley, supra* (No. 06-0131-cr) (taking same position, and noting that "there is presently no other statutory provision, apart from § 924(c), that contains penalties" to which the "except" clause would apply). This reading would

give the second half of the "except" clause no effect; and as noted above, *supra* at 22-23, because of the presumption against cumulative punishments, its proposed reading would give the clause no effect *even if* a future Congress were to enact a separately codified § 924(c) clone. There is no warrant for giving the expansive phrase "any other provision of law," which has such a broad meaning elsewhere in § 924(c), an interpretation that would apply it in a "limited and * * * haphazard" manner. *Nijhawan*, 129 S. Ct. at 2302; accord *Hayes*, 129 S. Ct. at 1087-1088.

B. The Existence Of Statutes That Impose Greater Mandatory Minimums Than § 924(c) For Possession Of The Same Firearm In The Same Transaction Confirms That This Interpretation Is The Most Plausible Alternative Reading Of The Statutory Text

The conclusion that the "except" clause applies to firearms offenses is borne out by reviewing the provisions of the United States Code outside of § 924(c) that impose longer mandatory minimum sentences for possession of a firearm than could be applied under the corresponding provision within § 924(c). At least three statutes impose a mandatory minimum sentence in excess of the five-year minimum established by § 924(c), and thus would qualify as "other provision[s] of law" that trigger the "except" clause. Like the offenses currently listed in § 924(c), they describe a series of offenses that are graduated in seriousness and severity of punishment, and, but for the "except" clause, a criminal defendant could receive a mandatory minimum consecutive sentence under one of these statutes in addition to

the § 924(c) sentence. See generally 18 U.S.C. § 924(c)(1)(D)(ii).

The most relied upon of these three statutes is ACCA, which is codified at 18 U.S.C. § 924(e). ACCA provides a fifteen-year mandatory minimum sentence for felons who possess a gun in violation of 18 U.S.C. § 922(g)(1) and have three previous convictions for serious drug offenses or violent felonies—most of which could serve as § 924(c) predicate offenses. See 18 U.S.C. §§ 922(g)(1) & 924(e). Unsurprisingly, the courts of appeals have singled out § 924(e) as an obvious candidate for inclusion among the "other provision[s] of law" that trigger the "except" clause. The Second Circuit, for example, concluded that "[r]ead literally, as we believe the 'except' clause of 924(c)(1)(A) should be, the clause exempts [a criminal defendant] from the consecutive [§ 924(c)] minimum sentence * * * because he is subject to the higher fifteen-year minimum sentence provided by section 924(e)." *Whitley*, 529 F.3d at 158.

Section 924(e), which is closely related to the offenses in § 924(c) and is frequently prosecuted,[11] starkly poses the risk of "double counting" by imposing a separate minimum sentence for possession of the same firearm. The First Circuit, for example, identified § 924(c) as a provision that would pose a "double counting danger" but for the "except" clause's bar against the imposition of multiple mandatory minimum sentences for the same firearm. *Parker*, 549 F.3d at 11. Even the Third Circuit below recognized that Abbott's case is "complicated" by the

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[11]In fiscal year 2008, there were 2778 counts of conviction for § 924(c) and 749 counts of conviction for § 924(e). See U.S. Sentencing Comm'n, *Overview of Statutory Mandatory Minimum Sentencing*, App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf.

fact that he received a sentence under § 924(e) for firearm possession, in addition to a separate § 924(c) sentence *for possessing the very same gun*. Pet. App. 16a.

Two other offenses, which are prosecuted much less frequently than § 924(e),[12] also impose greater mandatory minimum sentences than § 924(c) that could result in multiple sentences for using the same firearm in the same transaction. Section 3559(f)(3) of Title 18 imposes a ten-year mandatory minimum sentence when a defendant uses a dangerous weapon during and in relation to a crime of violence against children. Section 930(c) of that title, by reference to § 1111, imposes a minimum sentence of life imprisonment for first-degree murder involving the use of a firearm or other dangerous weapon in a federal facility. Like § 924(c)'s provisions, these statutes involve conduct beyond mere possession or use of a firearm. But although these statutes, like § 924(c), provide mandatory minimum sentences for firearm use in connection with crimes of violence, both the Third Circuit and the government take the position that these statutes do not come within the sweep of the "except" clause. See Pet. App. 12a; Pet. at 12, *Williams*, *supra* (No. 09-466); U.S. Pet. for Reh'g En Banc at 7-8, *Whitley*, *supra* (No. 06-0131-cr).

Reading "any other provision of law" to apply to other firearms offenses outside of § 924(c) would sensibly construe the second half of the "except" clause to perform the same basic function as the first half of the clause, which applies only to firearms

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[12]In Fiscal Year 2008, there was one count of conviction involving § 3559(f)(3), and no counts of conviction involving § 930(c). See *Overview of Statutory Mandatory Minimum Sentencing*, *supra*, App. B.

offenses within § 924(c). Both halves of the same clause would work together to prevent the imposition of multiple minimum sentences for possession or use of the same firearm. Just as the "except" clause avoids imposition of separate minimum sentences under § 924(c) for simple possession and for brandishing a firearm, see Pet. at 11, *Williams*, *supra* (No. 09-466), it is sensibly read to avoid imposition of separate minimum sentences for simple possession and for possession by a convicted felon, see 18 U.S.C. §§ 922(g) & 924(e).

As the First Circuit has recognized, it is reasonable to conclude that the 1998 amendments added the "except" clause because "[c]onceivably, Congress wished to avoid a double increment for the same firearm." *Parker*, 549 F.3d at 11; see also Pet. App. 16a ("[I]t would be logical for Congress to 'provide[] a series of increased minimum sentences [under § 924(c)] and also to [make] a reasoned judgment that where a defendant is exposed to two minimum sentences * * * only the higher minimum should apply.'") (quoting *Whitley*, 529 F.3d at 155) (brackets in original). When Congress created the "except" clause, it would have been aware that the sort of violent or drug-related firearm use that made many defendants eligible for a mandatory minimum under § 924(c) also would have exposed them to even higher mandatory sentences under related statutes, especially the commonly invoked § 924(e). Congress naturally would have considered statutes like these when it drafted the "except" clause in an effort to avoid duplicate punishments for firearm possession.

C. Supposed "Anomalies" Do Not Justify Disregarding The Plain Meaning Of The Text And The Rule Of Lenity

The court below recognized that "it is obvious that the language [of the "except" clause] has some limiting effect." Pet. App. 19a. The court recognized that statutes such as § 924(e), "for purposes of § 924(c), might be construed as 'a greater minimum sentence[] otherwise provided by this subsection or by any other provision of law.'" Pet. App. 16a. The court rejected this reading of § 924(c), however, because of concerns that it would yield anomalous sentences in some unlikely situations—even as it acknowledged that such anomalies were "not readily apparent" on the facts of this case. Pet App. 17a. But as noted above, *supra* at 27-30, there is no "anomalous results" canon empowering courts to redraft statutory language, and in any event, those concerns are unwarranted.

As explained above, the anomalies that concerned the court of appeals are illusory because the sentences at issue are only *minimum* sentences. District courts can almost always avoid any perceived discrepancies among different offenders by increasing a sentence appropriately to reflect the seriousness of the offense, or by ordering sentences to run consecutively rather than concurrently. See *supra* at 30-32 & n.7; *Whitley*, 529 F.3d at 155; *Williams*, 558 F.3d at 174-175.

Moreover, as the Second Circuit cogently explained, "th[is] apparent anomaly" vanishes entirely "if the 'except' clause is limited to higher minimums contained only in firearms offenses." *Whitley*, 529 F.3d at 155. Limiting the application of the "except" clause to firearms offenses would make

offenders subject *both* to a sentence for the predicate offense (drug trafficking or crime of violence) *and* to whatever higher mandatory minimum sentence could be imposed for the use or possession of the firearm in the same transaction. See *id.* at 155-158. The supposed anomaly in minimum sentences hypothesized by the Third Circuit would thus disappear completely. See *ibid.*

The phantom of anomalous sentences in hypothetical cases caused the Third Circuit to overlook a very real anomaly in the case before it: Under its reading, a defendant receives *two consecutive* mandatory minimum sentences for the single use of a single firearm. This Court has warned against departing from a statute's plain meaning when the alternative reading "would correct one potential anomaly while creating others." *Logan* v. *United States*, 552 U.S. 23, 33 (2007). This principle applies with additional force here because the anomaly created by the Third Circuit's reading is far more odious than the supposed anomalies it feared. Unlike the hypothetical anomalies it sought to avoid, this true anomaly cannot be mitigated through adjustments by the sentencing judge because both sentences would be statutory minimums.

Even if the application of the "except" clause to other firearms offenses were unclear, it is impossible to say that the "except" clause clearly does *not* apply to such offenses. The weight of opinion from the courts of appeals illustrates as much. See *supra* at 37-38 (describing how most courts of appeals to have reached the issue have concluded that the "except" clause applies to firearms offenses codified outside of § 924(c)). At the very least, therefore, the statute is ambiguous as to its reach, which means that the rule

of lenity would apply and require that any ambiguities be resolved in favor of the defendant.

Concerns about fairness, which underlie the rule of lenity, are particularly acute in this case because of the draconian results of the Third Circuit's reading. The Third Circuit's interpretation of § 924(c) would impose multiple mandatory, consecutive criminal sentences for the possession or use of the same firearm in the same transaction. This case therefore squarely implicates one of the core concerns animating the rule of lenity—the "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348; see also *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) ("[N]o citizen should be * * * subjected to punishment that is not clearly prescribed."); *Granderson*, 511 U.S. at 53-54.

Applying the rule of lenity in this instance also "places the weight of inertia upon the party that can best induce Congress to speak more clearly"—the government. *Santos*, 128 S. Ct. at 2025 (plurality opinion). Prosecutions under § 924(c) are a staple of federal criminal practice, and prosecutors frequently charge § 924(c) in addition to other firearms offenses with mandatory minimums. The implications of a contrary reading of the statute therefore will have far-reaching punitive consequences. See Pet. at 23-24. If Congress truly wishes for Kevin Abbott—and future defendants like him—to serve an additional five years in prison for possession of a firearm, on top of the fifteen years he is already serving for possession of the same firearm in the same transaction, that is obviously a policy choice for Congress to make. But surely it is not asking too much to require Congress to say so in unmistakable terms.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

Nos. 09-479 and 09-7073

In the Supreme Court of the United States

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

CARLOS RASHAD GOULD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Section 924(c) of Title 18 requires a five-year mandatory consecutive sentence for carrying, using, or possessing a firearm in connection with "any crime of violence or drug trafficking crime" "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The question presented is whether the "except" clause exempts a defendant from any sentence for a Section 924(c) violation if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense.

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OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Abbott* (Abbott Pet. App. 1a-25a) is reported at 574 F.3d 203. The opinion of the district court (Abbott Pet. App. 26a-32a) is available at 2008 WL 540737. The opinion of the court of appeals in *United States* v. *Gould* (Gould Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 329 Fed. Appx. 569. An

earlier opinion of the court of appeals in *United States* v. *Gould* is reported at 529 F.2d 274.

JURISDICTION

The judgment of the court of appeals in *United States* v. *Abbott* was entered on July 28, 2009. A petition for rehearing was denied on August 31, 2009 (Abbott Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 19, 2009, and was granted on January 25, 2010. The judgment of the court of appeals in *United States* v. *Gould* was entered on July 29, 2009. A petition for rehearing was denied on August 28, 2009 (Gould Pet. App. 3a). The petition for a writ of certiorari was filed on October 16, 2009, and was granted on January 25, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 18 U.S.C. 924(c)(1), 18 U.S.C. 924(c)(1) (1994), and 18 U.S.C. 3559(c), are set forth at App., *infra*, 1a-8a.

STATEMENT

1. *No. 09-479.*

a. When executing a search warrant at a house in Philadelphia identified as the site of crack dealing, the police encountered Kevin Abbott standing in the doorway. Abbott slammed the door when the officers identified themselves. After breaking down the door, police arrested Abbott as he tried to escape through a kitchen window. Police recovered the following from Abbott: $617 in cash (including $20 in prerecorded buy money), a key to the building's front door, a bag of marijuana, and a false driver's license. A search of the building

uncovered narcotics, drug paraphernalia, and two handguns. Abbott Pet. App. 3a-4a.

A grand jury sitting in the Eastern District of Pennsylvania returned an indictment charging Abbott with conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. 846; possession with intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g) and 924(e). Abbott Pet. App. 4a-5a. The government filed an information under 21 U.S.C. 851 that exposed Abbott to a mandatory minimum term of ten years of imprisonment on the drug trafficking charges because of prior convictions for felony drug offenses. See 21 U.S.C. 841(b)(1)(B); 2:05-cr-00333 Docket Entry No. 45 (filed Jan. 10, 2006). Abbott's criminal history also exposed him to a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which requires such a sentence if the defendant has been convicted under 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). A jury found Abbott guilty on all counts. Abbott Pet. App. 26a.

b. At sentencing, the government noted that Abbott faced certain statutorily mandated terms of imprisonment: ten years in prison for each of the two drug trafficking convictions, 15 years in prison under the ACCA for the Section 922(g) conviction, and five years in prison for the Section 924(c)(1)(A) conviction. 2:05-cr-00333 Docket Entry No. 147, at 3-4 (filed Dec. 6, 2007). The

government further advised the court that, under Section 924(c), the term of imprisonment Abbott received for violating that statute had to run consecutively to the term of imprisonment for the Section 922(g) conviction and that Abbott therefore faced a minimum term of 20 years in prison. *Id.* at 4 & n.1; see 18 U.S.C. 924(c)(1)(D)(ii).

Abbott opposed such a sentence, arguing that the language of Section 924(c)(1)(A) exempted him from a consecutive five-year sentence for his Section 924(c) conviction. He relied on the statute's introductory "except" clause, which provides that a defendant who violates Section 924(c) must receive a five-year sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Abbott contended that the 15-year term of imprisonment for the Section 922(g) conviction was a "greater minimum sentence" provided by "any other provision of law" for purposes of the "except" clause. He therefore argued that the district court could impose a concurrent sentence for violating Section 924(c) and urged the court to impose a term of imprisonment totaling 15 years in prison: 15 years for the Section 922(g) conviction under the ACCA, a concurrent ten-year term for the two drug trafficking convictions, and a concurrent five-year term for the Section 924(c) conviction. Dist. Ct. Dkt. 152, at 1-2; 2/5/2007 Tr. 8-11.[1]

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[1] In the district court, Abbott contended that the five-year term under Section 924(c) had to run consecutively to the mandatory ten-year term for his drug trafficking convictions, but that the resulting term of 15 years could run concurrently with the 15 years for the Section 922(g) conviction. See 2/5/2007 Tr. 8-11.

The district court sentenced Abbott to 20 years in prison. Judgment 2. The court concluded that, under the ACCA, Abbott was subject to a 15-year term of imprisonment for his Section 922(g) conviction. Abbott Pet. App. 28a-29a. The court imposed the ten-year statutory minimum on the two drug trafficking counts to run concurrently with each other and the 15 years on the ACCA sentence. Judgment 2. Finally, the court imposed a consecutive term of five years of imprisonment for the Section 924(c) conviction. *Ibid.*; Abbott Pet. App. 32a. The court rejected Abbott's interpretation of the statute's "except" clause, concluding that "[t]he plain language of [Section 924(c)] clearly and unambiguously mandates the district court to run any sentence under section 924(c) consecutive to all other sentences stemming from a crime of violence or drug trafficking in the same criminal proceeding." *Id.* at 29a.

c. The court of appeals affirmed. The court held that "the most cogent interpretation" of Section 924(c) "is that the prefatory clause refers only to other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." Abbott Pet. App. 12a. For example, the court explained, if a defendant brandishes a short-barreled rifle during a drug trafficking offense or violent crime, "[t]he prefatory clause simply makes clear that the ten-year minimum [of Section 924(c)(1)(B)(i)] applies" instead of the seven-year minimum sentence of Section 924(c)(1)(A)(ii). *Id.* at 13a. The phrase "any other provision of law," the court held, refers to provisions outside of Section 924(c) that prescribe a sentence for violating the statute, "in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922." *Ibid.*

The court rejected an interpretation of the "except" clause that would exempt a defendant from any sentence for violating Section 924(c) "when a predicate [drug trafficking offense or violent crime] carries a minimum sentence greater than the relevant minimum imposed by" Section 924(c). Abbott Pet. App. 14a. The court noted that such an interpretation would conflict with Section 924(c)'s mandate to impose the sentences prescribed in the statute "*in addition to* the punishment provided for" the predicate offense. *Ibid.* The court also concluded that such an interpretation would be inconsistent with Congress's goal in amending the statute in 1998 to "broaden the statute's reach" and would lead to anomalous results that Congress could not have intended. *Id.* at 14a-15a. The court likewise concluded that the "except" clause does not exempt a defendant from receiving a sentence for violating Section 924(c) if the firearm possession underlying that offense also gives rise to a mandatory minimum sentence under another firearm-specific statute such as the ACCA. The court thus "agree[d] with the majority of courts that the 'except' language connotes a comparison between alternative minimum sentences for a violation of [Section] 924(c), not between sentences for separate violations of [Section] 924(c) and another statute." *Id.* at 19a-20a.

2. *No. 09-7073.*

a. When executing a warrant to search petitioner Carlos Gould's house (the suspected site of cocaine distribution by Alfred Bryant), the police arrested Gould. In Gould's pockets, the police found approximately 29 grams of crack cocaine and 12 grams of powder cocaine. A search of the house uncovered ten grams of powder cocaine, 61 grams of crack cocaine, a quantity of marijuana, two firearms, multiple rounds of ammunition,

drug scales, and currency. In a car parked outside the house, police found Gould's social security card together with a military flak jacket, two nine-millimeter firearms, a sawed-off shotgun with an obliterated serial number, ammunition, and two grams of crack cocaine. Gould J.A. 11-12.

After his arrest, Gould told federal agents that he owned the house and that he used it primarily to sell crack cocaine. He said that Bryant also sold crack cocaine from the house and that Bryant had given him money to purchase firearms to protect the house. Gould stated that Bryant's role was to sell the crack cocaine and that Gould served as a security person, or "enforcer." 06-11058 Gov't C.A. Br. 4-5.

A grand jury sitting in the Northern District of Texas returned an indictment charging Gould with one count of conspiracy to possess with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 846; one count of possession with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); two counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); two counts of possession of a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g); and one count of possession of a firearm with an obliterated serial number, in violation of 26 U.S.C. 5861(g). C.A. R.E. Tab 3. Gould pleaded guilty pursuant to an agreement to the drug conspiracy count and one count of violating Section 924(c) in connection with that offense. *Id.* Tab 6; Gould J.A. 15-16.

b. At sentencing, the district court determined that the advisory Sentencing Guidelines range for Gould's

drug trafficking conviction, which carried a mandatory minimum term of ten years in prison, see 21 U.S.C. (b)(1)(A)(iii), was 110 to 137 months. 8/20/2008 Tr. 43-44. The court imposed a sentence at the top of that range, 137 months, to be followed by a consecutive five-year term for the Section 924(c) conviction. Gould J.A. 16. Gould unsuccessfully objected to the imposition of the Section 924(c) sentence, relying on the Second Circuit's decision in *United States* v. *Whitley*, 529 F.3d 150 (2008). 08/20/2008 Tr. 39-40. In *Whitley*, the Second Circuit construed the introductory language of Section 924(c) to mean that a defendant is exempt from any sentence for a Section 924(c) conviction when he is subject to a greater mandatory minimum sentence under the ACCA. 529 F.3d at 151.

c. The court of appeals affirmed. Gould J.A. 15-17. Rejecting Gould's arguments based on the "except" clause, the court concluded that its decision was controlled by the reasoning and holding of *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007), which the court had recently adopted in a precedential opinion, *United States* v. *London*, 568 F.3d 553 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009). See Gould J.A. 16. In *Collins*, the court agreed with decisions of other courts of appeals that "the 'exception' clause of § 924(c)(1)(A) does not permit a district court to consider a sentence below the mandatory minimum simply because a defendant's predicate conviction carries a mandatory minimum sentence greater than the mandatory minimum sentence that applies under § 924(c)." 205 Fed. Appx. at 197. Construing the "except" clause "in the context of the language and design of the statute as whole," *id.* at 198 (citation and internal

quotation marks omitted), the court concluded that it was "reasonable to read the phrase 'any other provision of law' as referring to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime," *ibid.*

SUMMARY OF ARGUMENT

The courts of appeals correctly upheld petitioners' sentences under Section 924(c). The statute's introductory "except" clause means that a defendant who commits a Section 924(c) offense is subject to the baseline five-year mandatory minimum sentence set forth in Section 924(c)(1)(A) unless Section 924(c) itself or any provision of law imposes a greater mandatory minimum for that offense. Contrary to petitioners' various interpretations, and consistent with the conclusion of the overwhelming majority of courts of appeals, a defendant is not exempt from any sentence for a Section 924(c) offense whenever he faces a higher mandatory minimum on a different count of conviction.

I. Section 924(c)(1)(A) provides for the imposition of specified minimum sentences "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law," 18 U.S.C. 924(c)(1)(A), but it does not explicitly state what offense may give rise to such a triggering sentence. As petitioners implicitly acknowledge, the clause must "have some understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008) (emphasis omitted), cert. denied, 129 S. Ct. 1688 (2009). The natural referent of the "except" clause is the offense that immediately follows—using, carrying, or possessing a firearm in connection with a crime of violence or drug-

trafficking. All parties agree that the phrase "this subsection" means Section 924(c) and therefore refers to sentences for violation of that statute. Under the canon that general terms of a statute draw their meaning from neighboring words, the phrase "any other provision of law" similarly refers to sentences for violation of Section 924(c) that are contained elsewhere in the United States Code.

Petitioners contend that this reading of "any other provision of law" is incorrect because, in their view, Congress would not prescribe minimum sentences for violation of Section 924(c) in a separate statute. In fact, Congress has done exactly that in 18 U.S.C. 3559(c), which requires a mandatory minimum sentence of life imprisonment for a Section 924(c) offense committed by a defendant with a particularly serious criminal record. See 18 U.S.C. 3559(c)(1), (c)(2)(F). The drafting history of that provision provides compelling support for the decisions below: Congress amended Section 3559(c) to encompass additional Section 924(c) offenses in the same bill that added the "except" clause in 1998.

The purpose of Section 924(c) also supports the courts of appeals' interpretation of the "except" clause. The text and history of Section 924(c) make clear that Congress intended the statute to create a deterrent to employing firearms during certain crimes by providing that any defendant who does so must receive a consecutive minimum sentence in addition to any other applicable sentence. The interpretation applied in sentencing petitioners furthers that purpose because it ensures that a defendant will receive a sentence for Section 924(c) over and above any punishment for different counts of conviction, and thus that the same conduct will be punished more harshly when it involves a firearm.

II. Petitioners propose several mutually inconsistent interpretations of the "except" clause, but none is compatible with statutory text, purpose, or history. Although petitioners emphasize the breadth of the phrase "any other provision of law," they do not urge a literal reading of those words. Instead, they offer three different readings of the phrase: any provision of law that provides a minimum sentence available to the court at the time of sentencing on the Section 924(c) offense; any provision of law that is violated in the same criminal transaction giving rise to the Section 924(c) offense; or, finally, any provision of law that is violated by the possession of the same firearm at issue in the Section 924(c) offense.

None of those inventive interpretations finds support in either the statute's text or principles of statutory interpretation. Each interpretation would frustrate the purpose of Section 924(c) by entirely eliminating any sentence for a violation of that statute when a different count of conviction carries a higher mandatory minimum sentence. Under petitioners' readings, a defendant would face no sentence for violating Section 924(c) when he is also convicted under 21 U.S.C. 841(b)(1)(A) or when he qualifies as an armed career criminal under 18 U.S.C. 924(e). Because drug convictions and ACCA sentences are frequently paired with Section 924(c) convictions, petitioners' interpretations would render the statute irrelevant in a broad swath of cases.

Petitioners' interpretations create anomalies that Congress could not have intended. Under their view, a defendant convicted of a standalone substantive offense receives no sentence for that crime. Less culpable defendants would face a higher mandatory minimum sentence than more culpable offenders. And Gould's pro-

posed interpretation, which turns on whether the defendant faces a higher mandatory minimum on a different offense at the time he is sentenced for the Section 924(c) crime, would make the applicability of a sentence under Section 924(c) turn largely on the form of the government's charging instruments. Petitioners dismiss these anomalies primarily by saying that, when they arise, district courts may exercise their discretion under 18 U.S.C. 3553(a) to adjust the total sentence. But in 1998 (when the relevant language was added to Section 924(c)) Congress could not possibly have anticipated that this Court would make the Guidelines advisory. Nor is there any reason to believe that Congress decided to eliminate the Section 924(c) sentence but simultaneously invited courts to increase the sentence on the predicate offense when they disagreed with that decision, or, more generally, that Congress intended to rely on the court's discretion as an adequate substitute for the mandatory minimum scheme it prescribed in Section 924(c).

In addition, petitioner's arguments conflict with the legislative history of the "except" clause. Petitioners do not dispute that, under the pre-1998 version of Section 924(c), the mandatory sentence for violation of that provision would have applied even if the defendant faced a higher minimum sentence for another offense. Petitioners contend, however, that the 1998 amendments eliminated any sentence for violation of Section 924(c) in such circumstances. But as this Court recently explained in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), Congress made only two significant substantive changes to Section 924(c) in 1998, and those revisions were intended to expand the scope of the statute and increase the penalties for its violation. Neither substantive change sug-

gests that Congress meant, by adding the "except" clause, to strip the statute of any effect in cases where its sentences previously applied.

III. Finally, there is no reason to resort to the rule of lenity in this case. The statutory text, purpose, and history make clear that the "except" clause refers to sentences for violation of Section 924(c), not for different counts of conviction. Because that clause does not suffer from any grievous ambiguity or uncertainty, the rule of lenity does not apply.

ARGUMENT

A DEFENDANT WHO VIOLATES SECTION 924(c) IS SUBJECT TO A FIVE-YEAR MANDATORY MINIMUM SENTENCE UNLESS SECTION 924(c) OR ANOTHER PROVISION OF LAW REQUIRES A HIGHER MINIMUM SENTENCE FOR THAT OFFENSE

Section 924(c) provides that a defendant convicted of using or carrying a firearm during and in relation to any drug trafficking crime or crime of violence, or possessing a firearm in furtherance of such a crime, shall, in addition to any other punishment, be sentenced to a minimum term of five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Contrary to petitioner's various contentions, the "except" clause does not exempt a defendant from any sentence under Section 924(c) whenever he is subject to a higher mandatory minimum sentence for a different offense. Rather, as a majority of the courts of appeals to consider the question have reasoned, the provision applies to higher minimum sentences for the Section 924(c) offense itself.

I. The Text, Structure, Purpose, And History Of The "Except" Clause Make Clear That It Refers to Provisions Of Law Prescribing Minimum Sentences For Violating Section 924(c)

The "except" clause of Section 924(c) refers to other sentences for the offense defined in that statute—sentences that may be found either within Section 924(c) itself or elsewhere in the United States Code. That interpretation is the most natural reading of the "except" clause and, in particular, the phrase "any other provision of law." It also furthers the purpose of Section 924(c) to impose an additional, cumulative punishment on defendants who use or possess firearms in the commission of their crimes and thereby to provide an added deterrent to such conduct.

A. The "Except" Clause, Read Naturally, Refers To Other Sentences For Section 924(c) Violations

1. Section 924(c)(1)(A) provides that a defendant who engages in the described conduct must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A). Although the "except" clause indicates that it is triggered when a defendant is subject to a "greater minimum sentence," the clause "does not say 'a greater minimum sentence' *for what*." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Construed literally and without consideration of context, the "except" clause would eliminate any sentence under Section 924(c) whenever the defendant faced a greater mandatory minimum sentence for state-law charges, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. Petitioners agree, however, that

the "except" clause cannot be "unbounded." *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). Indeed, as petitioner Abbott notes, a purely literal construction of the clause would render Section 924(c) "meaningless," because it would eliminate any sentence under that statute "simply because a higher mandatory minimum sentence exists in the United States Code for a crime the defendant did not commit." Abbott Br. 19; see Gould Br. 14. Thus, the clause must "have *some* understood referent to be intelligible." *Parker*, 549 F.3d at 11.

The "understood referent" of the clause is the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. Eight courts of appeals have thus concluded that the "except" clause does not exempt a defendant from punishment under Section 924(c) whenever he faces a longer mandatory minimum sentence for another crime. See *United States* v. *Villa*, 589 F.3d 1334, 1345 (10th Cir. 2009), petition for cert. pending, No. 09-1445 (filed May 26, 2010); *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam), petition for cert. pending, No. 09-8536 (filed Jan. 8, 2010); Abbott Pet. App. 12a; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009) (adopting reasoning of *United States* v. *Collins*, 205 Fed. Appx. 196 (5th Cir. 2006) (per curiam), cert. denied, 551 U.S. 1170 (2007)), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 1281 (2010);

United States v. *Studifin*, 240 F.3d 415, 421-424 (4th Cir. 2001); *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). Instead, as the Seventh Circuit has stated, the "except" clause means that "a defendant convicted under § 924(c)(1) shall be sentenced to a term of imprisonment set forth in § 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* § 924(c)(1) offense." *Easter*, 553 F.3d at 526.

This interpretation is "[t]he most natural reading of the relevant statutory text." See *United States* v. *Ressam*, 553 U.S. 272, 274 (2008). No one disputes that the phrase "this subsection" in the "except" clause refers to Section 924(c) and that a "greater minimum sentence * * * provided by this subsection" therefore means a greater minimum sentence for violating Section 924(c)(1)(A) as set forth in that provision. Specific subsections of Section 924(c) establish that in certain circumstances—for example, when the firearm involved is brandished or discharged—a defendant who possesses, uses, or carries a firearm in connection with a drug trafficking offense or crime of violence is subject to a penalty that exceeds the minimum five-year penalty set forth in Section 924(c)(1)(A)(i). Thus, if a defendant possessed a firearm in furtherance of a drug trafficking crime, that defendant is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i); *except* that if the firearm was brandished during the drug trafficking crime, the defendant is instead subject to the seven-year mandatory minimum sentence under Section 924(c)(1)(A)(ii); *except* that if the firearm is discharged during the crime, the defendant is instead

subject to a ten-year mandatory minimum sentence under Section 924(c)(1)(A)(iii); *except* that if the defendant has previously been convicted of violating Section 924(c)(1)(A), the defendant is instead subject to a minimum term of 25 years under Section 924(c)(1)(C)(i).

The meaning of "any other provision of law" is similarly straightforward. A "greater minimum sentence * * * provided by * * * any other provision of law" means a greater minimum sentence for violating Section 924(c) that is prescribed by a provision of the United States Code other than Section 924(c). See *Villa*, 589 F.3d at 1342-1343; Abbott Pet. App. 12a; *Easter*, 553 F.3d at 526; *Collins*, 205 Fed. Appx. at 198; *Studifin*, 240 F.3d at 423. That phrase makes clear that, if another provision of the United States Code mandates a punishment for using, carrying, or possessing a firearm in connection with a drug trafficking crime or crime of violence, and that minimum sentence is longer than the punishment applicable under Section 924(c), then the longer sentence applies.

This reading of the phrase "any other provision of law" accords with fundamental canons of statutory construction. This Court has emphasized that the language of a statute "cannot be interpreted apart from context." *Smith* v. *United States*, 508 U.S. 223, 229 (1993); see *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted). The Court has also explained that when construing a statute, it does not "'look merely to a particular clause' but consider[s] 'in connection with it the whole statute.'" *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2317 (2008) (quoting *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974)). Similarly, a phrase should be "given more precise content by the neighboring words

with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008); see, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006).

The surrounding language confirms that the phrase "any other provision of law" refers to statutes imposing a greater minimum sentence for violating Section 924(c). Those words constitute half of a phrase—"by this subsection or by any other provision of law"—denoting the sources of law that may provide a "greater minimum sentence" triggering the "except" clause. 18 U.S.C. 924(c)(1)(A). All parties agree that the other part of that phrase ("this subsection") refers to provisions that prescribe minimum sentences for the Section 924(c) crime. Under the most natural reading, "any other provision of law" likewise refers to provisions elsewhere in the United States Code that address the same offense. The prefatory "except" clause, moreover, "is followed directly by the specific types of conduct prohibited under § 924(c)." *Villa*, 589 F.3d at 1343. There is "no linguistic or contextual demarcation separating the prescribed conduct from the prefatory clause." *Ibid.* As a result, the "except" clause is most reasonably read to refer to a "higher minimum sentence" for the offense that follows—possessing, using, or carrying a firearm in connection with a drug trafficking crime or crime of violence.

2. Petitioners contend that this interpretation of the phrase "any other provision of law" is incorrect because it would be "utter[ly] and "startlingly implausible," (Abbott Br. 10, 22, 25), "exceedingly unlikely," (*id.* at 25), and "strange[]" (Gould Br. 5) for Congress to impose mandatory penalties for a Section 924(c) offense in a different provision of the United States Code. But in fact, Congress has done exactly that in 18 U.S.C.

3559(c). And the history of that provision—which was amended in order to track changes to Section 924(c) in the same bill that contained the "except" clause—leaves no doubt that Congress understood the relationship between the two statutes.

Section 3559(c)(1)(A) provides that a defendant convicted of "a serious violent felony shall be sentenced to life imprisonment" if the defendant has been convicted in state or federal court on separate occasions of either "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. 3559(c)(1)(A). The statute defines "serious violent felony" to include "firearms possession (as described in section 924(c))" and "firearms use," 18 U.S.C. 3559(c)(2)(F)(i), which is in turn defined as "an offense that has as its elements those described in section 924(c) * * *, if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and in relation to which the firearm was used was subject to prosecution in" federal or state court, 18 U.S.C. 3559(c)(2)(D). The statute therefore provides a mandatory minimum sentence for defendants who violate Section 924(c) with particularly serious criminal histories. Thus, under the "except" clause, a defendant who possesses a firearm in furtherance of a drug trafficking offense or crime of violence is subject to a mandatory consecutive five-year sentence under Section 924(c)(1)(A)(i), *except* that if the defendant was previously convicted on separate occasions of two serious violent felonies, the defendant is instead subject to a term of life imprisonment under 18 U.S.C. 3559(c)(1)(A)(i).

The drafting histories of Sections 924(c) and 3559(c) demonstrate that Congress understood the relationship

between the two statutes and intended them to be linked. Section 3559(c) was originally enacted as a part of the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, § 70001, 108 Stat. 1982. When first enacted, as now, that statute defined "serious violent felony" to include "firearms use." 18 U.S.C. 3559(c)(2)(D) (1994). But the original definition of "serious violent felony" did not encompass "firearm possession," just as Section 924(c) at the time did not include that term.

In 1998, when Congress added the "except" clause, it also expanded Section 924(c) to cover possession of a firearm in furtherance of a predicate offense thereby to "counteract" this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the "use" provision in Section 924(c) required the defendant to "actively employ[]" the firearm and did not cover mere possession). See *United States* v. *O'Brien*, 130 S. Ct. 2169, 2180 (2010). At the same time that Congress made those changes to Section 924(c), it also revised Section 3559(c) to make parallel changes. In particular, in the same bill that amended 924(c) to add the "except" clause and to encompass firearms possession, Congress amended Section 3559(c)(2)(F)(i) by expanding the definition of "serious violent felony" to include "firearms possession (as described in section 924(c))." See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a) and (b), 112 Stat. 3469-3470.[2]

Thus, when Congress added the "except" clause, it also amended Section 3559 to provide that a defendant

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[2] In the other significant change to Section 924(c) contained in that bill, Congress stepped up penalties when a firearm was "brandished" or "discharged"—concepts that were already present in, and that Congress borrowed from, Section 3559(c).

who possesses a firearm in violation of Section 924(c) must receive a mandatory minimum sentence of life if he has the requisite criminal history. These actions provide compelling evidence that Congress intended the phrase "[e]xcept to the extent that a greater minimum sentence is otherwise provided * * * by any other provision of law" to refer to sentences provided by other provisions of the United States Code, such as Section 3559(c), that impose greater minimum penalties for the 924(c)(1)(A) offense.[3]

3. In addition to providing instruction on how the amended Section 924(c) was intended to interact with other, existing provisions such as Section 3559(c), the phrase "any other provision of law" establishes a "safety valve" for future statutory provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." *Collins*, 205 Fed. Appx. at 197-198 (finding convincing the reasoning of *Studifin*, 240 F.3d at 423 (interpreting language as a "safety valve" for future statutory provisions mandating

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[3] Section 3559(c) is not alone in imposing greater penalties for violation of Section 924(c). For example, 18 U.S.C. 924(j)(1)—a provision of law outside of "this subsection"—provides that a person who commits murder with a firearm in the course of a Section 924(c) offense may be sentenced to death. See, *e.g.*, *United States* v. *Battle*, 289 F.3d 661, 665-669 (10th Cir.) (concluding that Section 924(j)(1) sets forth a sentencing enhancement to the Section 924(c) offense analogous to increased punishments for brandishing or discharge), cert. denied, 537 U.S. 856 (2002); *United States* v. *Allen*, 247 F.3d 741, 769 (8th Cir. 2001) (holding that "§ 924(j) is fairly interpreted as an additional aggravating punishment for the scheme already set out in § 924(c)" because of "§ 924(j)'s explicit reference to § 924(c) and because each subsection of the statute is designed for the same purpose—to impose steeper penalties on those criminals who use firearms when engaging in crimes of violence"), vacated on other grounds, 536 U.S. 953 (2002).

penalties for the Section 924(c) offense)); see Abbott Pet. App. 13a.

Contrary to petitioner's contention, it is not "farfetched" or "implausible" that Congress would include language in Section 924(c) to allow for the possibility that it would later "create a longer mandatory minimum sentence for § 924(c) violations without making any mention of the new provision's interaction with § 924(c) itself." Abbott Br. 24; Gould Br. 21. As explained above, Sections 3559(c) and 924(j)(1) demonstrate that Congress has in fact enacted provisions outside of Section 924(c) establishing penalties for that offense.

More generally, there is nothing unusual about Congress prescribing mandatory minimum penalties for substantive offenses codified in other provisions. Section 3559 mandates a minimum term of life imprisonment not only for certain Section 924(c) offenses but also for violation of a range of other statutory provisions found elsewhere in the code, including 18 U.S.C. 1111 (murder), 49 U.S.C. 46502 (aircraft piracy), and 18 U.S.C. 2111, 2113, and 2118 (robbery). The ACCA is another familiar example of a provision that requires increased punishment for an offense that Congress defined earlier and elsewhere. Section 922(g)(1), which Congress enacted as a part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, sec. 902, § 922(e), 82 Stat. 230, makes it unlawful to possess a firearm after being convicted of an offense punishable by more than a year in prison. A defendant convicted of violating Section 922(g)(1) generally may be "imprisoned not more than 10 years." 18 U.S.C. 924(a)(2). In 1984, however, Congress provided in the ACCA that if a defendant who violates Section 922(g)(1) has been previously convicted of three or more violent

felonies or serious drug offenses, he is subject to a mandatory minimum sentence of 15 years. See Abbott Pet. App. 13a ("In referring to alternative minimum sentences, the prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future—in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922.").

4. Petitioners argue on a number of grounds that the interpretation of the "except" clause adopted by the courts below is inconsistent with the plain meaning of the statutory text. None of those contentions is persuasive.

a. First, petitioners and their *amici* emphasize the breadth of the word "any," arguing that construing the "except" clause as referring to statutes providing a greater mandatory minimum for violating Section 924(c) effectively "read[s] 'any' other provision of law to mean only 'some' other provisions of law." Amicus Br. for Nat'l Ass'n of Crim. Def. Lawyers 14 (NACDL Amicus Br.). In support of that contention, petitioners rely on cases such as *United States* v. *Gonzales*, 520 U.S. 1 (1997), which adopted an expansive interpretation of the word "any" to hold that the phrase "any other term of imprisonment" in Section 924(c) includes sentences imposed under state law. *Id.* at 5.

The problem with that reading is suggested by petitioners themselves. Neither petitioner actually urges this Court adopt a literal reading of "any provision of law" that would encompass all provisions of law. Indeed, as Abbott notes in explaining why such a literal reading is untenable, interpreting "any other provision of law" without "restrictions or qualifiers," NACDL Amicus Br. 14, would mean that the "except" clause is always trig-

gered "simply because a higher mandatory minimum sentence exists in the United States Code." Abbott Br. 19. Similarly, despite their invocation of *Gonzales*, neither petitioner contends that the phrase "any other provision of law" includes state law, such that a defendant would be exempt from any sentence under Section 924(c) if he were subject to a higher mandatory minimum on a state-law conviction. And neither petitioners nor any court has held that the "except" clause is triggered by sentences for unrelated crimes charged in separate indictments. To the contrary, the Second Circuit has held that the "except" clause is not triggered by sentences for unrelated crimes even if those unrelated crimes are charged in the same indictment as the Section 924(c) count at issue. See *United States* v. *Parker*, 577 F.3d 143, 147 (2d Cir. 2009) (holding that the "except" clause did not apply because the crime carrying a higher mandatory minimum was unrelated to the Section 924(c) offense).

Instead, petitioners agree that the phrase "[e]xcept to the extent a greater minimum sentence is otherwise provided by * * * any other provision of law" must be read to refer only to a subset of the universe of laws providing mandatory minimum sentences. See pp. 32-33, *infra*. The question in this case thus is not whether the phrase "any other provision of law" must be qualified, but rather what qualification Congress intended. "The word 'any' considered alone cannot answer this question." *Small* v. *United States*, 544 U.S. 385, 388 (2005); see, *e.g.*, *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) ("[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them."); see also *Nixon* v. *Missouri Mun. League*,

541 U.S. 125, 132 (2004) ("any" means "different things depending upon the setting").[4]

b. Second, relying on *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), petitioners contend that it is unlikely Congress would have used the expansive term "any other provision of law" to denote the limited category of present or future statutes that would trigger the "except" clause under the courts of appeals' interpretation. Abbott Br. 22-24; Gould Br. 22 (criticizing the courts of appeals' interpretation of the "except" clause on the ground that Congress would not "enact such broad language if it had a narrow set of statutes in mind").

Petitioners' reliance on *Nijhawan*, however, is misplaced. That case concerned the meaning of 8 U.S.C. 1101(a)(43)(M)(i), which provides that an alien is deportable as an aggravated felon if he is convicted of "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 129 S. Ct. at 2297 (emphasis omitted). The Court concluded that the phrase could not be limited to offenses that have as an element a victim-loss requirement of more than $10,000. The Court based that conclusion in part on the ground that few such offenses exist. *Id.* at 2301-2302. But the function of the provision at issue in *Nijwahan* fundamentally differs from that of the "except"

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[4] Even if the phrase "any other provision of law" were given the most sweeping reading, the "except" clause would still be applicable only if, under any provision of law, a "greater minimum sentence is otherwise provided." That would leave the question of how to interpret the phrase "otherwise provided." Petitioners correctly concede that "otherwise provided" cannot be understood to mean "contained in any provision of the U.S. Code whether applicable to the defendant or not." Essentially for the reasons stated in this brief, the only plausible reading would be that the phrase means "otherwise provided for the violation of Section 924(c) at issue."

clause in Section 924(c). *Nijhawan* recognized that giving the scope-defining language of the statute the meaning the petitioner advanced would have frustrated Congress's purpose in including such offenses under the definition of "aggravated felony." In Section 924(c), by contrast, the "except" clause serves as a narrow *exception* to the general rule that a defendant who engages in the conduct described in 924(c)(1)(A) should receive a mandatory minimum five-year sentence. The government's interpretation of the exception thus advances, rather than frustrates, Congress's purpose in 924(c). See, *e.g.*, *Knight* v. *Commissioner*, 552 U.S. 181, 190 (2008) (Court is inclined, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, [to] read the exception narrowly in order to preserve the primary operation of the provision") (brackets in original) (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). In addition, this Court rejected the petitioner's proposed interpretation in *Nijhawan* partly because it caused the statutory trigger to function in an irrational manner. See 129 S. Ct. at 2302 (noting seemingly random set of federal and state statutes that would trigger deportation under petitioner's interpretation). As explained below, however, the government's interpretation avoids the irrational results that petitioners' constructions would create. See pp. 39-43, *infra*.

c. Third, Abbott contends (Br. 25-26) that this Court's double-jeopardy precedents undermine the courts of appeals' interpretation of the "except" clause. In particular, Abbott argues that, construed only to prohibit multiple punishments for the same Section 924(c) offense, the phrase "any other provision of law" serves no purpose because it is redundant of the established

principle that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Whalen* v. *United States*, 445 U.S. 684, 692 (1980).

That contention is incorrect and conflicts with petitioners' own understanding of the "except" clause. Petitioners agree that Congress included the phrase "this subsection" in the "except" clause to ensure that courts impose only one of the mandatory minimum sentences set forth in Section 924(c) for a violation of that statute. See Abbott Br. 15; Gould Br. 9. But if Congress had chosen to rely on the interpretive presumption against duplicative punishments when it drafted the "except clause," it would have had no need to include that phrase or indeed to add the clause at all. That Congress chose to adopt such language demonstrates that, instead of relying on courts to apply a background interpretive presumption, Congress chose to make explicit that persons who engage in the conduct proscribed by Section 924(c) must receive the single highest minimum sentence provided for that offense, whether that sentence is contained in "this subsection" or "any other provision of law."

B. The Natural Interpretation Of The Text Furthers The Central Purpose Of Section 924(c)

The text and legislative history of Section 924(c) make clear that the statute was intended to deter criminals from using or possessing guns in the course of certain crimes by ensuring that they would face an additional mandatory minimum sentence if they did so. That purpose is served by construing the "except" clause to refer to higher mandatory minimum sentences for the

Section 924(c) offense but not for other counts of conviction.

"The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Section 924(c) contains three central features that demonstrate its purpose to impose additional, cumulative mandatory minimum sentences on defendants who use, carry, or possess firearms in connection with crimes of violence or drug trafficking offenses and thereby create an added deterrent to committing such crimes with a firearm.

First, Section 924(c) specifies that the punishments it imposes "shall" be imposed "in addition to the punishment provided for" the underying "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). Second, the statute directs that its punishments apply even if the underlying crime of violence or drug trafficking offense "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Congress added that language to respond to this Court's decision in *Busic* v. *United States*, 446 U.S. 398 (1980), which held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision." *Id.* at 404; see *Simpson* v. *United States*, 435 U.S. 6, 15 (1978) (holding that courts may not impose a sentence under Section 924(c) in addition to a weapons enhancement for the underlying offense). "Congress [thus] made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Gonzales*, 520 U.S. at 10. Third, Section 924(c)(1)(D)(ii)

makes explicit the requirement that the sentences for a violation of the statute must run consecutively to any other punishment. That provision states:

> Notwithstanding any other provision of law * * *, no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. 924(c)(1)(D)(ii). The text of Section 924(c) thus leaves no doubt that Congress intended the statute to create mandatory minimum sentences that apply over and above any punishment that the defendant faces on other counts of conviction.

Section 924(c)'s legislative history supports that conclusion. Senator Helms, the sponsor of the legislation that added the "except" clause, noted the "commonsense" proposition that "[v]iolent felons who possess firearms are more dangerous than those who don't." *Violent and Drug Trafficking Crimes: The* Bailey *Decision's Effect on Prosecutions Under Section 924(c): Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 3-4 (1996) (*1996 Hearings*) (statement of Sen. Helms). He therefore explained that the measure he supported "will ensure that future criminals possessing guns * * * will serve real time when they possess a gun in furtherance of a violent or drug trafficking crime." *Criminal Use of Guns: Hearing on S. 191 Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 3-4 (1997) (*1997 Hearings*) (statement of Sen. Helms). Representative McCollum, who introduced in the House the bill that added the "except"

clause, emphasized just before the bill's passage that the increased penalties it added are "enhancements on top of [any] underlying sentence for a crime that is committed with a gun." 144 Cong. Rec. 25,037 (1998) (statement of Rep. McCollum). Senator Biden captured the basic rationale of Section 924(c) in 1996 hearings about an earlier version of the bill that added the "except" clause:

> When we enhance penalties, whether they work or not, one of the underlying purposes—the rationale is we are trying to dissuade people from engaging in that activity. The bottom line here is what we intended was we don't want people carrying guns, committing crimes. We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person who doesn't.

1996 Hearings 10 (statement of Sen. Biden).[5]

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[5] Abbott mischaracterizes the legislative history of the "except" clause in two significant respects. First, he contends that the government did not support inclusion of the "except" clause in the 1998 amendments and is now "asking this Court to provide it with a statute that Congress refused to enact." Br. 26-27. In fact, a Department of Justice representative testified before the Senate Judiciary Committee in both 1996 and 1997 that the Department supported in principle all of the bills under consideration, including those that contained the "except clause." *1996 Hearings* 7 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.); *1997 Hearings* 9-13 (statement of Kevin Di Gregory, Deputy Asst. Att'y Gen.). The Department expressed "minor disagreement" with various aspects of the other bills, but it did not even mention—much less voice disapproval of—their introductory language. *Id.* at 10.

Second, Abbott describes (Br. 27-28) the amendments to Section

The natural reading of the "except" clause—to apply to other sentences for Section 924(c)—gives full effect to the deterrent purposes of Section 924(c). That interpretation requires imposition of the highest mandatory minimum penalty applicable to a Section 924(c) offense in addition and consecutive to the sentence for any other count of conviction. Consistent with Congress's intent, a defendant who commits a crime of violence or a drug trafficking offense with a gun will thus face an additional mandatory term of imprisonment as a result.

II. Petitioners' Interpretations Of The "Except Clause" Lack Any Basis In Statutory Text, Conflict With The Purpose And History Of Section 924(c), And Create Anomalies That Congress Could Not Have Intended

Contending that the interpretation of the "except" clause adopted by the majority of the courts of appeals is unreasonable, petitioners instead offer three conflicting readings of that provision. First, Abbott contends (Br. 15-21) that the clause refers to sentences for offenses that the defendant commits in the "same criminal transaction" giving rise to the Section 924(c) offense. Second, Abbott switches gears and argues (Br. 39-47) that the clause refers to sentences for other firearms-specific offenses arising from possession of the same gun

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924(c) that added the "except" clause as "fundamentally a compromise," arguing that the legislation was intended in part to mitigate increased punishments for armed criminals. That characterization is unfounded. The hearings on the bill reflected broad bipartisan support for expanding and increasing the punishments for possessing a gun in the course of predicate crimes. Remarking on that consensus, Senator Biden thanked the chairman "for being so vigilant and moving so rapidly on this" and stated: "This is an unusual day. The record should note that Biden, the Justice Department and Jesse Helms all agree on something." *1996 Hearings* 11-12 (statement of Sen. Biden).

involved in the Section 924(c) offense. Third, Gould disagrees with Abbott, contending instead (Gould Br. 4-5, 7-18) that the "except" clause refers to any sentence the court may impose for any crime at the time the defendant is sentenced for the Section 924(c) offense.

These interpretations are incorrect. Each depends on textual interpolations that find no support in the plain language of Section 924(c). In addition, all three interpretations frustrate the purpose of Section 924(c), contradict its legislative history, and create anomalies that Congress could not have intended when it amended Section 924(c) to add the "except" clause.

A. Petitioners' Interpretations Find No Support In The Text Of Section 924(c)

Petitioners purport to ground their interpretations of the "except" clause in the statute's plain language, contending that the courts of appeals' principal error was "depart[ing] from the 'except' clause's actual text" and "forc[ing] into the statute words that Congress did not include." Gould Br. 5. All of petitioners' interpretations, however, require this Court to infer from Section 924(c) various implausible qualifications that are nowhere contained in its "actual text." *Ibid.*

1. Both Abbott and Gould premise their positions on the words "any other provision of law," which they describe as an "expansive" and "open-ended" phrase that "means a provision of law, other than [Section] 924(c), selected without restriction." Abbott Br. 16-17 (emphasis omitted); Gould Br. 12-13. But petitioners' proposed interpretations require significant restrictions and qualifications on the reach of the phrase "any other provision of law." Abbott's primary position construes that phrase as if it read "any other provision of law that the defen-

dant violates in the same criminal transaction that gave rise to the Section 924(c) offense." Abbott's alternative argument converts "any other provision of law" into "'any other provision of law' * * * that imposes a 'greater minimum sentence' for the defendant's possession or use of the same firearm" involved in the Section 924(c) offense. Br. 39. And Gould's interpretation requires interpreting "any other provision of law" as if it read "any other provision of law" that imposes a greater mandatory minimum sentence "required for any of a defendant's counts of convictions at sentencing" on the Section 924(c) count. Br. 14. Thus, contrary to petitioners' contentions, their interpretations hardly "[r]ead[] 'any other provision of law' to mean what it says." Abbott Br. 17.

The qualifications petitioners propose, moreover, are textually implausible. Petitioners have provided no principle of statutory construction that explains why the phrase "any other provision of law" actually means laws violated as part of the same criminal transaction giving rise to the Section 924(c) violation; laws violated by the possession or use of the same firearm that was involved in the Section 924(c) offense; or laws that impose mandatory minimum punishments available to the court at the time of sentencing on the Section 924(c) crime. Abbott does not attempt to supply such an explanation based on specific aspects of the statutory text. And although Gould purports to locate support for his interpretation (Br. 14-15) in the present tense phrasing of the "except" clause and the words "is otherwise provided," that contention lacks merit. In common parlance, a punishment "is provided" by a statute even if that punishment does not apply at the sentencing of a particular defendant. The text of the "except" clause thus does not support

petitioners' positions. See *Parker*, 549 F.3d at 11 (noting that interpreting the referent of the "except clause" as "'any other crime related to this case' or 'the underlying drug crime or crime of violence' * * * require[s] reading into the clause a referent not literally expressed") (emphasis omitted); *Alaniz*, 235 F.3d at 389 ("We have scoured the statutory language, yet we find no support for the proposition * * * that subdivision (c)(1)(A)'s 'greater minimum sentence' clause applies to the predicate drug trafficking crime or crime of violence of which a particular defendant has been convicted").

B. Petitioner's Interpretations Frustrate The Purpose Of Section 924(c)

Petitioners also attempt to justify their interpretations on the basis of statutory purpose. The goals that petitioners attribute to Congress in enacting Section 924(c), however, cannot be squared with the text of that provision.

1. a. In support of his primary position, Abbott contends (Br. 20) that "[t]he reason is simple" that the "except" clause must be read to refer to sentences for other counts of conviction arising from the same "criminal transaction" as the Section 924(c) offense. That reason, he argues, is the "obvious purpose" of Section 924(c): "to ensure that a defendant receives at least five years in prison as a result of using or possessing a gun in connection with a violent crime or drug trafficking offense." *Ibid.* Thus, Abbott contends, "[i]f the same defendant receives more than five years' imprisonment because another statute, triggered by the same criminal transaction, imposes a higher mandatory minimum, the plain language and obvious purpose of [Section] 924(c) are satisfied." *Ibid.* Gould advances the same account of

the statute's purpose. See Br. 17 (contending that "Congress wanted to ensure that a defendant who commits a drug-trafficking or violent crime using, carrying, or possessing a firearm will spend at least 5 years in prison," and that "Congress reasonably believed that this purpose is served if that defendant is subject to a mandatory minimum sentence of more than 5 years for * * * the drug trafficking crime")

That contention is inconsistent with the text of Section 924(c). If Congress had intended only to ensure that a defendant convicted of Section 924(c) serves a total of at least five years in prison for all of his crimes, Congress easily could have accomplished that purpose by providing that the mandatory minimum sentence for the Section 924(c) offense should run concurrently with the sentences for other counts of conviction, including any sentence for the underlying drug trafficking offense or violent crime. But as explained above, Congress did precisely the opposite. It directed that the mandatory minimum sentence for the Section 924(c) must be imposed "*in addition to*" the sentence for any other crime, 18 U.S.C. 924(c)(1)(A) (emphasis added), and it separately instructed that the Section 924(c) sentence shall *not* "run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. 924(c)(1)(D).

Petitioners' explanations of the statute's purpose fail to account for these central aspects of its text. As the Fourth Circuit has explained, petitioners'

> construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to

> choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory consecutive sentences against those who commit crimes of violence while using or carrying firearms in furtherance of their crimes.

Studifin, 240 F.3d at 423; see *Parker*, 549 F.3d at 11 ("[Defendant's] reading is suspect on its face because section 924(c)(1)(A)'s supplementary provision ([Section 924(c)(1)(D)])—by providing a five year sentence 'in addition to the punishment' for the predicate crime— self-evidently intends that one who carries a firearm in connection with a serious drug offense should serve a further consecutive sentence of five years.").

b. To support his alternative argument, Abbott mints an altogether different explanation of the purpose of Section 924(c) and its "except" clause. He contends that the "except" clause must be understood to refer to other offenses arising from the same firearm involved in the Section 924(c) count because that clause was intended to avoid "*double counting* the use or possession of the same firearm in the same transaction." Br. 39; *id.* at 45 ("except" clause represented "an effort to avoid duplicate punishments for firearm possession"); *ibid.* ("Congress wished to avoid a double increment for the same firearm") (citation omitted).

The suggestion that cumulative punishment would involve "double counting," however, overlooks the different functions of Section 924(c) and the ACCA. The ACCA punishes any possession of a firearm by a felon who has a particularly serious history of recidivism. Its focus is on the repeat offender, not on a particular use of a firearm. Section 924(c), in contrast, requires no criminal history, but instead punishes the injection of a fire-

arm into another crime. To substitute the recidivism enhancement in the ACCA for the separate Section 924(c) sentence effectively gives the defendant the use of a gun facilitating another crime for free.

The language Congress added to Section 924(c) in response to this Court's decision in *Busic*, moreover, refutes the notion that Congress viewed Section 924(c) as implicating double counting. In *Busic*, the Court held that "prosecution and enhanced sentencing under § 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision" for use of the firearm. 446 U.S. at 404; see *Simpson*, 435 U.S. at 15 (holding that a federal court may not impose sentences under both Section 924(c) and the weapon enhancement under the armed bank robbery statute, 18 U.S.C. 2113, based on a single criminal transaction). Repudiating that decision, "Congress amended § 924(c) so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Gonzales*, 520 U.S. at 10 (quoting Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138). "At that point, Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* Given that history, Abbott cannot plausibly contend that Congress intended to prevent "double counting" for firearms offenses.

2. The true purpose of Section 924(c) renders petitioners' interpretations unreasonable. As explained above, the text and history of that statute make clear that Congress sought to create a deterrent to using or

possessing guns during predicate crimes by ensuring that any defendant who does so will receive an additional mandatory minimum sentence over and above other applicable sentences. All three of petitioners' interpretations, however, would eliminate any sentence for the Section 924(c) offense when the defendant faced a higher mandatory minimum on a different count of conviction.

Under Gould's position, a defendant would escape any sentence under Section 924(c) if, at the time of sentencing, he faces a mandatory minimum for any other offense, however unrelated to the Section 924(c) conduct. Under Abbott's primary position, a defendant would receive no separate sentence for using, carrying, or possessing a firearm if the underlying crime triggers the ten-year mandatory minimum set forth in the Controlled Substances Act (CSA). See 21 U.S.C. 841(b)(1)(A) (prescribing ten-year mandatory minimum for, *inter alia*, trafficking in more than five kilograms of cocaine or 50 grams of cocaine base). And under Abbott's alternative interpretation, a defendant who possesses a firearm in furtherance of a crime of violence or a drug trafficking offense would be exempt from any punishment for the Section 924(c) offense if he is also convicted of being a felon-in-possession and has three prior qualifying convictions under the ACCA. See 18 U.S.C. 924(e) (requiring a 15-year mandatory minimum if a defendant violates Section 922(g)(1) and has previously been convicted of three violent felonies or serious drug offenses).

Petitioners' interpretations of the "except" clause would thus frustrate the purpose of Section 924(c) in each of those situations. For the reasons petitioners' *amicus* emphasizes, moreover, the circumstances ad-

dressed by petitioners' interpretations are extraordinarily common. "The drug trafficking and firearms possession statutes that produce related counts of conviction account for almost all minimum sentences that could come into play under the 'except' clause." NACDL Amicus Br. 17 n.5; *id.* at 12 ("the two most likely sources of greater minimum sentences are the CSA and the ACCA"). Thus, under petitioners' interpretations, Section 924(c) would not achieve its purpose in precisely the circumstances for which it was intended and in which it is most commonly invoked.

C. Petitioners' Interpretations Create Sentencing Anomalies That Congress Could Not Have Intended

Petitioners' various readings of the "except" clause create anomalies that Congress could not have intended when it amended Section 924(c) in 1998.

1. a. Under all of petitioners' interpretations, a defendant convicted of violating Section 924(c) would receive no sentence for that offense when the "except" clause applies. See Gould Br. 33-34 (contending that, in circumstances triggering the "except" clause, a sentence for the Section 924(c) sentence "would never be imposed at all") (quoting *Williams*, 558 F.3d at 172). Petitioners' interpretations thus effectively treat Section 924(c) as a mere sentencing enhancement that can be displaced by some greater minimum for a different offense. Cf. *United States* v. *Whitley*, 529 F.3d 150, 151 (2d Cir. 2008) (describing Section 924(c) as a "sentencing statute"). "But [Section] 924(c) does not define an enhancement; it defines a standalone crime" of using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; see *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009) ("The princi-

pal paragraph [of Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by petitioners' positions—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

b. Petitioners' interpretations would produce mandatory minimum sentences for less culpable defendants that are higher than those for more culpable defendants. As the court of appeals explained, that anomaly is illustrated by considering two defendants convicted of trafficking in cocaine—the first possessing 500 grams and therefore subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and thus subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandished a firearm in furtherance of his drug offense, all agree that the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: a five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandished a firearm in furtherance of his much more serious drug offense, under Gould's and Abbott's principal position the "except" clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more culpable offender would face a lesser minimum sentence—precisely *because* his

underlying offense is more serious. It is inconceivable that Congress intended such a result. See Abbott Pet. App. 15a (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

c. Similar anomalies arise from Abbott's alternative argument, which interprets the "except" clause to apply to sentences under other firearms-specific statutes for possession of the same weapon involved in the Section 924(c) offense. Consider, for example, the relatively typical case of a defendant convicted of a drug trafficking offense carrying a ten-year mandatory minimum term, a Section 924(c) "brandishing" offense, and a Section 922(g) felon-in-possession offense. Under Abbott's alternative interpretation, if that defendant is subject to the ACCA on the Section 922(g) offense because he has an extensive criminal history, he would face a minimum of 15 years in prison, consisting of the mandatory minimum under 18 U.S.C. 924(e) running concurrently with the sentence for the drug conviction. That defendant would benefit from the "except" clause and face no penalty for violating Section 924(c). A defendant who committed all the same crimes, however, would face a higher mandatory minimum sentence if he were not subject to the ACCA. That defendant would be required to serve 17 years—two years longer than the identically situated armed career criminal—because he would be subject to a mandatory minimum term of ten years for the underlying drug crime plus seven consecutive years for the Section 924(c) violation. Thus, the first defendant is subject to a *less* severe statutory minimum because he has a *more* serious criminal history. This cannot be what Congress intended.

d. Gould's interpretation, which turns on what other minimum sentences are available to the court at the time of sentencing on the Section 924(c) offense, would create the additional anomaly that the form of the government's charging instruments determines the applicability of the "except" clause. Consider, for example, a defendant who committed three crimes: (1) a robbery in 2001; (2) discharge of a gun during that robbery (carrying a mandatory ten-year minimum under Section 924(c)(1)(A)(iii)); and (3) possessing a gun in 2005, after sustaining three prior violent felony or serious drug convictions, in violation of 922(g) and 924(e) (carrying a 15-year mandatory minimum under the ACCA). Under Gould's reading, if the defendant were charged with all of those crimes in a single indictment, the "except" clause would apply and the ten-year minimum sentence under Section 924(c) would disappear. Because he would be sentenced at the same time on the entirely unrelated ACCA offense, the defendant would escape any statutory penalty for having violated Section 924(c) four years earlier. By contrast, if the government charged the Section 924(c) offense separately from the unrelated ACCA offense, then under Gould's interpretation the "except" clause would not be triggered at sentencing and the defendant would be subject to multiple and consecutive mandatory minimums.

There is no logical reason why the applicability of a sentence under Section 924(c) should turn on how the government crafts its charging instruments. Indeed, this Court rejected a similar proposition in *Deal* v. *United States*, 508 U.S. 129 (1993), dismissing as implausible an interpretation of Section 924(c) that "would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of

§ 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment." *Id.* at 133. The court declined "to give the statute a meaning that produces such strange consequences." *Id.* at 134. Like the construction rejected in *Deal*, Gould's "reading would confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging." *Id.* at 134 n.2 (emphasis omitted).

2. Petitioners contend on various grounds that these anomalies do not undermine their proposed interpretations of the "except" clause. Those contentions lack merit.

a. First, petitioners contend that these anomalies do not constitute the type of "absurdities" that would justify "disregard[ing] a statute's plain meaning based on the results such a reading would produce." NACDL Br. 25; Abbott Br. 30. For the reasons explained above, however, petitioners' interpretations do not reflect the plain meaning of Section 924(c), nor are they supported —much less compelled—by the statute's "plain text." Gould Br. 34. Rather, the anomalies created by petitioners' interpretations illustrate the conflict between the practical effect of those interpretations and the purposes of Section 924(c). They simply confirm what an analysis of statutory text and purpose make clear: petitioners' proposed interpretations of the "except" clause are unnatural and incorrect. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

b. Second, petitioners attempt to rationalize the anomalies on the ground that such outcomes concern only the applicable minimum sentence, not the total sen-

tence that any particular defendant will actually receive. Petitioners contend that, when the "except" clause applies, the district court may correct any anomaly or disparity in the minimum sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the other offenses of conviction. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines based on Section 3553(a) to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. Abbott Pet. App. 18a ("Congress could not have intended to create such sentencing disparities with the clairvoyant expectation that seven years later the Supreme Court would * * * grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

All of petitioners' arguments that rely on the discretion of the district court suffer from the obvious flaw that statutory mandatory minimums are designed specifically to limit a judge's sentencing discretion. In enacting Section 924(c), Congress intended to circumscribe the district court's ability to adjust sentences in cases in which defendants possessed, used, or carried a firearm in connection with predicate offenses by providing mandatory minimum sentences for that crime. It would make no sense for Congress to limit district court discretion in this way and simultaneously to rely on the exercise of sentencing discretion on other counts to effectuate the statute's purpose and avoid anomalous results.

c. Petitioners next contend (Abbott Br. 32-35; Gould Br. 29-30) that Congress intended for provisions of the Sentencing Guidelines in effect since 1998 to resolve the sentencing anomalies resulting from their interpretations of the "except" clause. They emphasize Guidelines provisions requiring a court to increase a defendant's offense level when the offense involves a firearm. See Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(6). They also point to a Guidelines provision, Sentencing Guidelines § 5K2.6, that allows district judges to depart upward from the applicable Guidelines range when an offense involves a firearm. This argument contravenes both statutory text and the congressional intent behind Section 924(c).

The text of Section 924(c) demonstrates that Congress did not consider firearm-related Guidelines enhancements to be an adequate substitute for the mandatory minimum penalties set forth in that statute. Section 924(c)(1)(A) provides that a defendant must receive a consecutive term of imprisonment for violating the statute even if the predicate drug trafficking crime or violent crime already "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 924(c)(1)(A). As set forth above, Congress added that language to repudiate this Court's decisions in *Busic* and *Simpson*. See pp. 28, 37, *supra*; *Gonzales*, 520 U.S. at 10. In doing so, "Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Ibid.* If Congress rejected the view that statutory enhancements to a predicate offense were sufficient to punish a violation of Section 924(c), it follows that Congress did not believe

that the sentencing enhancements under the Guidelines for those predicate offenses could achieve its desire to impose incremental additional punishment for the Section 924(c) offense.

Petitioners' argument also runs counter to Section 924(c)'s legislative history. At the 1996 congressional hearings in response to the *Bailey* decision, Professor David Zlotnick urged reliance on the Guidelines' enhancement scheme. See *1996 Hearings* 46 (statement of David M. Zlotnick). But that is not the path Congress chose. Instead, as one witness summarized at the 1997 hearings, Congress made a judgment that the "enhancements [provided by the Sentencing Guidelines] are relatively minor and may have little or no impact on the sentence that is actually imposed. The Sentencing Guidelines are thus no substitute for the tough mandatory penalties of [S]ection 924(c)." *1997 Hearings* 34 (statement of Thomas G. Hungar).

d. Finally, petitioners argue (Abbott Br. 35-36; Gould Br. 34) that the anomalies resulting from their positions would arise only in "isolated hypothetical situation[s]" that are not representative of the "run of cases" in which Section 924(c) is charged. Abbott Br. 35 (quoting *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 42 (1928) (Holmes, J., dissenting); Gould Br. 34 (describing the comparisons presenting anomalies as "imagined" and "fanciful hypotheticals") (brackets and citation omitted). That is incorrect. There is nothing remotely "fanciful" about federal prosecutions in which defendants are convicted of various permutations of offenses carrying different mandatory minimum sentences under Section 924(c), the CSA, and the ACCA. As petitioners' *amicus* notes, "indictments containing both CSA and Section 924(c) charges" are "routine." NACDL

Amicus Br. 13; *ibid.* (observing of the CSA and the ACCA that "it is common for one or both to be charged alongside" a Section 924(c) count).

D. Petitioners' Interpretations Are Unsupported By The Legislative History Of Section 924(c)

Petitioners' readings of the "except" clause find no support in the history of Section 924(c)(1)(A). Petitioners do not dispute that, under the pre-1998 version of that statute, a defendant convicted of violating Section 924(c) would have faced a mandatory sentence for that offense even if he also faced a higher mandatory minimum sentence for a different crime. They contend, however, that the effect of the 1998 amendments was to create a significant exemption in the statute by rendering a sentence for the Section 924(c) offense inapplicable in those circumstances. The legislative history of the 1998 amendments refutes that contention.

As this Court recently explained in *O'Brien*, Congress made "two [significant] substantive changes" in 1998 to the prior version of Section 924(c). 130 S. Ct. at 2179. First, Congress converted what were previously mandatory fixed sentences into mandatory minimum sentences. Thus, "[a] person convicted of the primary offense of using or carrying a firearm during a crime of violence was once to 'be sentenced to imprisonment for five years,' but under the current version he or she is to 'be sentenced to a term of imprisonment of not less than 5 years.'" *Ibid.* Second, in response to this Court's decision in *Bailey*, Congress expanded the reach of the statute by adding the word "possesses" in addition to "uses or carries" in the principal paragraph and by adding graduated minimum sentences for brandishing and discharging a firearm. *Ibid.*

The evident purpose and effect of these two changes was to expand and increase sentences for defendants who use, carry, or possess firearms in connection with other crimes. Petitioners' interpretations yield precisely the opposite effect, eliminating the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. But as *O'Brien* indicates, the legislative history contains no support for that result. "Aside from shifting the mandatory sentences to mandatory minimums, and th[e] so-called *Bailey* fix, Congress left the substance of the statute unchanged" in the 1998 amendments. *O'Brien*, 130 S. Ct. at 2179. "Neither of these substantive changes suggests that Congress meant," by adding the "except" clause, to effect the profound change in the statute's operation that petitioners urge. *Ibid.*

III. The Rule of Lenity Does Not Apply

Petitioners contend that "[a]t the very least," "the statute is ambiguous as to its reach," and therefore the rule of lenity requires this Court to adopt one of their constructions. See Abbott Br. 37-38, 47-48; Gould Br. 36-39. There is no reason to resort to the rule of lenity here.

"The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). It is implicated only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), a court "can make no more than a guess as to what Congress intended." *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (internal quotation

marks and citation omitted); see *Smith*, 508 U.S. at 239 (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)) (internal quotation marks omitted). For the rule to apply, there must be "grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

For the reasons explained above, the meaning of the "except" clause is clear in light of established principles of statutory interpretation. "The text, context, purpose, and" history of that clause "all point in the same direction:" a defendant must be sentenced to the highest applicable minimum sentence for the Section 924(c) offense, whether that minimum sentence is set forth in "this subsection" or "any other provision of law." *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009). Because the "except" clause does not suffer from any "grievous ambiguity or uncertainty," *Muscarello*, 524 U.S. at 139 (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)), the rule of lenity does not apply. See, *e.g.*, *Barber* v. *Thomas*, No. 09-5201 (Jun. 7, 2010), slip op. 17 (holding that the rule of lenity does not apply because the government's interpretation "reflects the most natural reading of the statutory language and the most consistent with its purpose"); *Dean*, 129 S. Ct. at 1856 (concluding that the discharge provision of Section 924(c)(1)(A)(iii) was not "grievously ambiguous" after considering "the statutory text and structure"); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting ap-

plication of the rule of lenity where the defendant's interpretation "is an implausible reading of the congressional purpose").

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 924(c)(1) (1994) provides:

Penalties

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.[2] Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

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[2] See 1988 Amendment note below.

2. 18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

3. 18 U.S.C. 3559(c) provides:

Sentencing classification of offenses

(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS.—

(1) MANDATORY LIFE IMPRISONMENT.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) DEFINITIONS.—For purposes of this subsection—

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

(B) the term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) the term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means—

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse

(as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

(H) the term "serious drug offense" means—

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United

States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

(3) NONQUALIFYING FELONIES.—

(A) ROBBERY IN CERTAIN CASES.—Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B) ARSON IN CERTAIN CASES.—Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) the offense posed no threat to human life; and

(ii) the defendant reasonably believed the offense posed no threat to human life.

(4) INFORMATION FILED BY UNITED STATES ATTORNEY.—The provisions of section 411(a) of the Controlled Substances Act (21 U.S.C. 851(a)) shall

apply to the imposition of sentence under this subsection.

(5) RULE OF CONSTRUCTION.—This subsection shall not be construed to preclude imposition of the death penalty.

(6) SPECIAL PROVISION FOR INDIAN COUNTRY.—No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.

(7) RESENTENCING UPON OVERTURNING OF PRIOR CONVICTION.—If the conviction for a serious violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

REPLY BRIEF

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KEVIN ABBOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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REPLY BRIEF FOR PETITIONER

I. THE GOVERNMENT CONTINUES TO DISREGARD THE PLAIN LANGUAGE OF THE STATUTE

This case involves a straightforward statutory provision: the "except" clause in 18 U.S.C. § 924(c). That clause provides that defendants should not receive a mandatory minimum sentence under § 924(c) if they face "a greater minimum sentence [that] is otherwise provided by this subsection or by any other provision of law." The case turns on the meaning of the phrase "any other provision of law."

The court of appeals, at the government's behest, held that the phrase "any other provision of law" serves solely as a "safety-valve" for future laws and does not apply to *any* existing provisions of law. Pet App. 13a. In our opening brief, we argued that this interpretation contravened the bedrock principle that statutory language should be accorded its plain meaning. Br. 13-18. It could scarcely be more plain that the phrase "any other provision of law" must include some provisions of law.

In its brief, the government does not try to defend the court of appeals' decision on its own terms. Nor, by extension, does the government defend its own earlier interpretations of the "except" clause, offered in this case and many others, including one pending before this Court. See Pet. at 12, *United States* v. *Williams* (2009) (No. 09-466) (pending) (noting the absence of any laws outside of § 924(c) covered by the "except" clause). Instead, the government now argues that the "except" clause actually *does* have a current application. See U.S. Br. 18-21. Under the government's new reading, instead of applying to *no*

existing laws, "any other provision of law" would apply to *one*: 18 U.S.C. § 3559(c).[1]

The government's shift is understandable, given the implausibility of reading "any other provision of law" to mean "no existing provision of law." But its new interpretation is scarcely more plausible than its earlier one. It remains inconsistent with the text, structure, and purpose of the statute and finds no support in the legislative history. Put simply, the phrase "any other provision of law" does not and cannot mean "one provision of law."

A. The Government's Interpretation Is Far From The "Most Natural Reading" Of The Statutory Text

The government argues that "any other provision of law" refers only to laws that require "higher minimum sentences for the Section 924(c) offense itself." U.S. Br. 13. This reading has no basis in the text, adds words to the statute that are not there, and fundamentally changes the meaning of the "except" clause. Instead of applying to "any other provision of law," as the statute plainly commands, the "except" clause would apply to a vanishingly narrow and partially hypothetical subset of laws: Section 3559(c) and some imaginary future laws, not one of which has materialized in the twelve years since the "except" clause was adopted. See Pet. Br. 21-26.

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[1] Section 3559(c) is a rarely used provision at that. The Sentencing Commission reports that there were only two counts of conviction for 18 U.S.C. § 3559(c) in 2008, the most recent year for which such statistics are available. See United States Sentencing Commission (USSC), *Overview of Statutory Mandatory Minimum Sentencing*, App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf.

The government nonetheless claims that its interpretation is "'the most natural reading of the relevant statutory text.'" U.S. Br. 16 (quoting *United States* v. *Ressam*, 553 U.S. 272, 274 (2008)). But reading "any other" to mean "almost none" is far from natural. As this Court recognized in *Republic of Iraq* v. *Beaty*, the word "any" in the phrase "any other provision of law" has an "expansive meaning"—not an exceedingly narrow one. 129 S. Ct. 2183, 2189 (2009) (internal quotation marks omitted).

The government never offers a persuasive reason to disregard the plain language of the statute. The government tries to argue, at one point, that petitioners themselves do not follow the plain language, implying that a plain reading of the "except" clause is not possible. U.S. Br. 23-24. It later backtracks from this argument, however, and in a footnote essentially endorses the logic of petitioner's interpretation. See U.S. Br. 25 n.4.

We argued in our opening brief that one could follow the plain meaning of "any other provision of law" without leaving the "except" clause completely unbounded. Br. 15-21. This is because application of the "except" clause still depends on whether a "greater minimum sentence is *otherwise provided*." § 924(c)(1)(A) (emphasis added). *Id.* at 18-20. The government, in footnote four of its brief, agrees and acknowledges that the phrase "otherwise provided" limits the "except" clause to laws that are applicable to a particular defendant. See U.S. Br. 25 n.4. Had the government stopped there, petitioner and the government would be in basic agreement about the meaning of the "except" clause.

The government goes a step further, however, and claims that "the *only plausible reading*" of "otherwise provided" is a sentence that is "'otherwise provided

for the violation of Section 924(c) at issue.'" See U.S. Br. 25 n.4 (emphasis added). But surely this is not the *only* plausible reading of the simple and general phrase "otherwise provided." Indeed, it is not even *a* plausible reading, given that it renders one half of the "except" clause largely superfluous.

As we explained in our opening brief, "otherwise provided," in combination with the phrase "any other provision of law," most naturally refers to a sentence that is otherwise provided for *this* defendant. See Pet. Br. 18-21. As we further explained, it is also sensible to construe "otherwise provided" to limit application of the "except" clause to sentences for conduct occurring during the transaction giving rise to the § 924(c) offense. Doing so avoids random applications of the "except" clause and is faithful to § 924(c)'s purpose. See *ibid.*; see also *United States* v. *Williams*, 558 F.3d 166, 171-172 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). The government's reading, by contrast, goes well beyond recognizing reasonable, contextual limits on the phrase "any other provision of law" and instead drains that phrase of its meaning. See, *e.g.*, *Knight* v. *Commissioner*, 552 U.S. 181, 190 (2008) (rejecting an interpretation of one provision that would cause another provision in the same statute to "do no work").

B. Under The Government's New Interpretation, The Phrase "Any Other Provision Of Law" Still Does No Work

The government, as mentioned, now argues that the "except" clause in § 924(c) applies to 18 U.S.C. § 3559(c). U.S. Br. 18-21. The government also suggests that it might apply to one other provision: 18 U.S.C. § 924(j)(1). *Id.* at 21 n.3. The government leans heavily on the existence of these provisions,

contending that they prove that the government's reading of the statute is plausible. *Id.* at 18-21. In fact, they demonstrate the opposite.

1. The "Except" Clause Is Unnecessary To Prevent Consecutive Sentences For § 3559(c) And § 924(c)

Section 3559(c), the federal "three strikes" law, imposes life imprisonment for serious repeat offenders, "notwithstanding any other provision of law." Two of the offenses, among many, that trigger § 3559(c) are "firearms possession" and "firearms use," as those terms are described in § 924(c). See 18 U.S.C. §§ 3559(c)(2)(F)(i), 3559(c)(2)(D). The government argues that the "except" clause operates in this context to make clear that a defendant who receives a life sentence under § 3559(c) should not also receive a separate consecutive sentence for a § 924(c) violation. U.S. Br. 18-21. That is, the "except" clause makes clear that courts should not impose a mandatory minimum sentence that would begin after the completion of a life sentence.

The flaw in that argument is apparent on its face. Life sentences under federal law are exactly that: sentences for the duration of the defendant's life, with no possibility of parole or early release. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027; 18 U.S.C. § 3624(b)(1). Put simply, there is no point in limiting the imposition of consecutive sentences that would begin after a defendant "completes" a life sentence in federal system, and it is implausible to think that Congress would have intended the broadly worded "except" clause to accomplish a purely metaphysical objective.

Even if it *were* plausible to suppose that Congress would use a broad phrase solely for this narrow, hypothetical purpose, that goal is already achieved by § 3559(c) itself. By requiring a life sentence "notwithstanding any other provision of law," § 3559(c) makes clear that courts cannot impose both a life sentence for a defendant whose "third strike" is a § 924(c) violation and a consecutive sentence for the same § 924(c) violation. Thus, the government's single proposed application for the phrase "any other provision of law" still leaves this portion of the statute "insignificant, if not wholly superfluous," and with "no operative effect on the scope of" § 924(c). See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

The government's invocation of the legislative history of § 3559(c) does not help its argument; in fact, it cuts the other way. The government argues that the "except" clause was needed in 1998 to reconcile § 924(c) and § 3559(c) because both statutes were simultaneously amended that year to cover "firearms possession." U.S. Br. 19-21. But this argument ignores the fact that § 924(c) and § 3559(c) were already linked before the 1998 amendments, because one of the felonies triggering § 3559(c) was "firearms use" as defined in § 924(c). See Pub. L. No. 103-322, § 70001, 108 Stat. 1982. Amending both statutes to cover firearms possession, in addition to firearms use, thus cannot possibly establish a sudden need in 1998 for an "except" clause in § 924(c) to reconcile the two statutes.

2. 18 U.S.C. § 924(j)(1) Can Never Trigger The "Except" Clause

That leaves § 924(j)(1). This statutory provision, which the government relegates to a footnote (U.S. Br. 21 n.3), establishes penalties for defendants who, in the course of violating § 924(c), cause the death of

another person through the use of a firearm. Defendants who violate § 924(j)(1) "shall be punished by death *or* by imprisonment for any term of years *or* for life." § 924(j)(1) (emphasis added). The government suggests that this provision falls within the "except" clause, apparently in another effort to show that its interpretation does not render the phrase "any other provision of law" meaningless.[2]

Section 924(j)(1), however, cannot trigger the "except" clause, which may explain why the government only hints at this argument. The reason is simple: Section 924(j)(1) does not establish a mandatory minimum sentence.[3] Thus, the second of two provisions the government cites to establish that its reading of the "except" clause does not render a portion of the statute superfluous points in exactly the opposite direction.

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[2] Oddly, the government never explicitly argues that § 924(j)(1) is covered by the "except" clause. Instead, the government states, obliquely, that "Section 3559(c) is not alone in imposing greater penalties for violation of Section 924(c)," and then goes on to describe § 924(j)(1). See U.S. Br. 21 n.3. The clear implication is that § 924(j)(1) is, like § 3559(c), covered by the "except" clause, but the issue is not free from doubt given the government's cryptic phrasing.

[3] The phrase "any term of years" is typically used to denote that there is no mandatory minimum sentence. See, *e.g.*, Revisor's Note, 18 U.S.C. § 1111 (explaining phrase as serving to "conform[] to a uniform policy of omitting the minimum punishment"). Even if the phrase were read to create a mandatory minimum, by its plain terms it could not establish a mandatory minimum longer than two years, which is less than the shortest mandatory minimum established by § 924(c). Either way, § 924(j)(1) could never trigger the "except" clause.

C. Following The Plain Language Of The "Except" Clause Neither Renders § 924(c) Meaningless Nor Contravenes The Statute's Purpose

Contrary to the government's insinuation (U.S. Br. 38-39), following the plain language of the "except" clause does not hollow out the sentencing provisions of § 924(c) by making them inapplicable whenever defendants face sentences for drug trafficking, crimes of violence, or firearms offenses. As the government is surely aware, there are numerous drug trafficking offenses, crimes of violence, and firearms offenses that either have no mandatory minimum sentence or impose a minimum sentence shorter than five years. Indeed, most of these offenses do not trigger mandatory minimum sentences. See 21 U.S.C. 841(b) (including a variety of non-mandatory-minimum penalties under the Controlled Substances Act); 21 U.S.C. § 960(b) (same regarding penalties under the Controlled Substances Import and Export Act); 18 U.S.C. § 924 (same regarding penalties for firearms offenses); 18 U.S.C. § 1111(b) (no mandatory minimum for second-degree murder); 18 U.S.C. § 1112 (no mandatory minimum for manslaughter). Not surprisingly, thousands of federal defendants are sentenced each year for such crimes and thus face no mandatory minimum sentence. See USSC, *Overview of Statutory Mandatory Minimum Sentencing* at 7.

Faithfully applying the "except" clause as written, therefore, would not render § 924(c) meaningless. The government's objection is nonetheless telling, if ironic, because it illustrates the obligation to avoid reading statutory provisions so as to leave them "with little, if any, meaningful application." *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009). This, of course,

is precisely what the government's reading of "any other provision of law" would do to one half of the "except" clause.

More generally, petitioner's interpretation of the "except" clause is perfectly consistent with the purpose of the statute and its legislative history. That purpose, as we explained in our opening brief (Br. 26-29), is to ensure that defendants who possess or use a gun during a crime of violence or drug trafficking spend at least five years in prison. None of the legislative history cited by the government (U.S. Br. 28-31, 47-48) suggests otherwise. Applying the "except" clause according to its plain meaning furthers the legislative purpose of § 924(c), while respecting the broad language that Congress actually used in the clause.

The government argues that Congress could have achieved the same purpose by requiring that § 924(c) sentences run concurrently, rather than consecutively, with sentences for other offenses. U.S. Br. 35. That a statute could be rewritten to achieve a similar purpose, however, is not a license to ignore the language that Congress has chosen. In any event, the government overlooks the fact that ensuring *at least* a five year sentence is not the same as ensuring *only* a five year sentence, which is what a concurrency requirement would establish in every case where the sentence for the predicate crime is less than five years. Including the "except" clause also serves to clarify that only one § 924(c) sentence should be imposed for a single violation. See, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359, 366-67 (1983).

Finally, the government's argument regarding the purpose of the "except" clause rests on the false assumption that defendants must always receive a § 924(c) sentence in addition to a sentence for the

predicate offense. See U.S. Br. 27-29. But that is not, in fact, how § 924(c) operates. Defendants can be convicted of a § 924(c) offense even if not charged with or convicted of a predicate offense. See, *e.g.*, *United States* v. *Hargrove*, No. 06-3184, 2010 WL 2399348, at *15 (10th Cir. June 16, 2010) (noting uniformity among courts of appeals on this issue). In these cases, because of prosecutorial discretion or a jury's decision, the only sentence a defendant will receive is for the § 924(c) offense. The government is thus incorrect in asserting that the purpose of § 924(c) is to ensure that defendants *always* receive a § 924(c) sentence *and* a sentence for the predicate crime. To the contrary, this feature of § 924(c) underscores that the actual purpose of § 924(c) is to ensure that defendants serve at least five years in prison, which is perfectly compatible with the plain language of the "except" clause.

II. THE GOVERNMENT'S ATTEMPT TO DISTINGUISH *NIJHAWAN* IS UNAVAILING

As we explained in our opening brief (Br. 22-24), this Court in *Nijhawan* rejected an interpretation that would leave a statutory provision "with little, if any, meaningful application." 129 S. Ct. at 2301. For similar reasons, we argued, the government's interpretation of the "except" clause in § 924(c) should be rejected. The government tries to distinguish *Nijhawan*, in part by asserting that the statutory interpretation rejected in that case would have "caused the statutory trigger to function in an irrational manner" because it would cover a "seemingly random set of federal and state statutes." U.S. Br. 26 (citing *Nijhawan*, 129 S. Ct. at 2302). Precisely the same could be said, however, of the government's interpretation of § 924(c)'s "except" clause.

A. The Government Never Explains What It Means By "A" Or "The" § 924(c) Offense

The government contends that "any other provision of law" in the "except" clause encompasses only laws that create a sentence for "*a* Section 924(c) offense" or "*the* Section 924(c) offense." U.S. Br. 10, 13 (emphasis added). But the government never explains exactly what it means by "a" or "the" § 924(c) offense. This silence is odd, both because this is a crucial part of the government's argument and because the answer is not obvious.

There are two possible answers, but neither helps the government. First, the government might be suggesting that there is only a single § 924(c) offense, and that only provisions of law that impose sentences for that single offense are included within the "except" clause. This position, however, cannot be squared with this Court's recent decision in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010), which made clear that there is no such thing as "a" or "the" § 924(c) offense.

As this Court held in *O'Brien*, § 924(c)(1)(B)(ii) establishes a separate offense, which requires proof of the element that a machine gun was possessed or used. See *id.* at 2180. All parties agree that the "except" clause applies to higher mandatory minimum sentences established by subsections of § 924(c), including the subsection at issue in *O'Brien*. It follows that separate offenses within § 924(c), and not simply sentencing enhancements, fall within the "except" clause. It remains a mystery why, under the government's reading, separate offenses outside of § 924(c) must be excluded from the "except" clause. The mystery only deepens when one considers that separate offenses outside of § 924(c) are supposedly

excluded by the inclusive phrase "any other provision of law."

The second possibility is that by "a" or "the" § 924(c) offense the government means to refer to the way offenses are defined for purposes of double jeopardy under *Blockburger* v. *United States*, 284 U.S. 299 (1932). Under that test, two offenses are considered the "same" unless each offense requires proof of a fact that the other does not. *Id.* at 304; see also *Whalen* v. *United States*, 445 U.S. 684, 691-692 (1980). But if *that* is what the government means, there is an enormous problem: Predicate § 924(c) offenses—drug trafficking and crimes of violence—are necessarily the "same" as § 924(c) offenses for purposes of the *Blockburger* test. Yet the government rejects the idea that sentences for predicate offenses fall within the "except" clause. U.S. Br. 14-18.

In sum, the government's insistence that the phrase "any other provision of law" includes *only* provisions of law that establish sentences for "a" or "the" § 924(c) offense, if followed, would make application of the "except" clause irrational at best and incoherent at worst. More fundamentally, it remains hard to arrive at the government's cramped and needlessly complicated interpretation from the simple statutory phrase "any other provision of law."

B. *Nijhawan* Cannot Be Distinguished On The Ground That The Statutory Provision At Issue In That Case Was "Scope-Defining"

The government also attempts to distinguish *Nijhawan* on the ground that the statutory trigger in that case—the definition of "aggravated felony" for purposes of deportation—is functionally different from the statutory trigger in this case. U.S. Br. 25-

26. The government argues that the statutory provision in *Nijhawan* was "scope-defining," while the provision at issue in this case is a "narrow *exception*" to the statute. *Ibid.* This is nothing but word play, fixating on the word "except" while ignoring the function of the "except" clause. The "except" clause establishes the operative scope of § 924(c) and is thus, by definition, "scope-defining."

There is no indication, in any event, that the principle of *Nijhawan* is somehow limited to "scope-defining" language, however defined—just as there is no indication that the duty to give meaning to each word in a statute only applies to "scope-defining" language. See, *e.g.*, *Duncan*, 533 U.S. at 174. The statutory provision at issue in *Nijhawan* defined one of more than fifty offenses that qualify as "aggravated felonies" for purposes of deportation. See 8 U.S.C. § 1101(a)(43). The notion that each of these fifty-plus definitions must be given an expansive reading, while the "except" clause must be given an exceedingly narrow one, cannot be supported. This Court in *Nijhawan* unanimously rejected an interpretation of one discrete and relatively minor provision in a sprawling deportation statute because it would give that provision "little, if any, meaningful application," 129 S. Ct. at 2301, and what application it would have would be random. The government's interpretation in this case ought to be rejected for the same reasons.

Knight v. *Commissioner*, 552 U.S. at 191, upon which the government relies (U.S. Br. 26), is not to the contrary. *Knight* rejected a statutory interpretation under which an "exception would swallow" or "eviscerate" a general rule. 552 U.S. at 191 (internal quotation marks omitted). For reasons already explained, according the "except" clause its plain

meaning would hardly "swallow" up or "eviscerate" § 924(c). See *supra* at 7-8.

III. THE GOVERNMENT OFFERS NO GOOD REASON TO REJECT PETITIONER'S ALTERNATIVE READING OF THE "EXCEPT" CLAUSE

In our opening brief, we offered an alternative reading of the "except" clause that would limit its application to other firearms offenses. Br. 39-48. We reasoned that this interpretation is consistent with the central purpose of § 924(c), which is to punish defendants who use firearms in the course of a crime of violence or drug trafficking. *Id.* at 39. This interpretation would also eliminate the hypothetical sentencing anomalies that have troubled some lower courts. *Id.* at 46-47.

The government agrees that the central purpose of § 924(c) is "to deter criminals from using or possessing guns in the course of certain crimes by ensuring that they would face an additional mandatory minimum sentence if they did so." U.S. Br. 27. That purpose would be served by limiting the "except" clause to laws, like the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), that establish mandatory minimum sentences for the use of firearms that are longer than the sentences under § 924(c). Nonetheless, the government chides petitioner for offering this modest, alternative reading of the statute, suggesting that it is implausible. U.S. Br. 36-37.

What the government now calls an implausible interpretation, however, is strikingly similar to the reading the government itself offered just two years ago in *United States* v. *Whitley*, 529 F.3d 150, 153 (2d. Cir. 2008). See also Pet. Br. 40-41 (quoting

government's Second Circuit brief in *Whitley*, which claimed that the "except" clause applies to other firearms offenses *outside* of § 924(c) as long as they provide consecutive sentences). As the First Circuit has recognized, moreover, it is perfectly plausible to assume that Congress wanted "to avoid a double increment for the same firearm," and thus sensible to conclude that the "except" clause applies to other firearms offenses. *United States* v. *Parker*, 549 F.3d 5, 11-12 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009).

The government argues that Congress could not have sought to avoid such "double counting" because other firearms offenses, such as ACCA, serve a different purpose than § 924(c). U.S. Br. 36-37. The government reasons that ACCA "focus[es] on the repeat offender, not on a particular use of a firearm." *Id.* at 36.

The weakness of the government's objection is obvious when one recalls that the government has conceded that the "three-strikes" law of § 3559(c) is covered by the "except" clause. *Id.* at 19-21. That law, like ACCA, contains a "recidivism enhancement," which is focused on "the repeat offender, not on a particular use of a firearm" (U.S. Br. 36). Yet the government agrees that defendants should receive only a § 3559(c) sentence and not an additional sentence for the § 924(c) offense.

The relationship between § 3559(c) and § 924(c) is also instructive because it indicates that Congress believed that the recidivism enhancement under § 3559(c) was sufficiently severe to justify *not* imposing a separate sentence under § 924(c). For similar reasons, Congress could have concluded that defendants already facing a fifteen-year sentence under ACCA need not receive an additional sentence

under § 924(c) for use of the same gun in the same transaction.

Indeed, the structure of § 924(c) reveals that Congress wanted to ensure that defendants who use or possess firearms in connection with specified crimes spend at least a definite, minimum amount of time in prison, leaving any additional penalties to the discretion of the district judge. Section 924(c) is not finely calibrated to ensure that, as defendants climb the ladder of seriousness in terms of their offenses, they receive a perfectly matched minimum sentence. The sentencing scheme instead reveals general thresholds rather than perfect stair-steps.

For example, a defendant who possesses a handgun is sentenced to five years, while a defendant who brandishes a handgun is sentenced to seven. Compare § 924(c)(1)(A)(i) with § 924(c)(1)(A)(ii). However, defendants who either possess *or* brandish a short-barreled rifle receive the same mandatory minimum sentence of ten years, see § 924(c)(1)(B)(i). Similarly, defendants who possess a machine gun receive a mandatory minimum sentence of thirty years, see § 924(c)(1)(B)(ii), but they face no higher minimum sentence for brandishing or even discharging the gun. Thus, once a certain threshold sentence is reached, previous distinctions among defendants no longer come into play.

Likewise, those who possess a short-barreled rifle are punished more severely for an initial offense than those who possess a handgun. Compare § 924(c)(1)(B)(i) (ten years) with § 924(c)(1)(A)(i) (five years). But for a second or subsequent offense, these defendants are treated identically—both receive a twenty-five year sentence. § 924(c)(1)(C)(i). These various provisions reveal an interest in reaching a threshold, beyond which mandatory distinctions

among offenses disappear and are instead left to the sentencing court. Thus, it is perfectly consistent with the structure of § 924(c) for Congress to have decided that, once a defendant receives fifteen years under ACCA for the use or possession of a firearm, there is no need to tack on another mandatory minimum sentence for the use or possession of the same firearm in the same transaction.

The government's reliance on *United States* v. *Gonzales*, 520 U.S. 1 (1997), is misplaced. In that case, this Court invoked the plain meaning of the phrase "any other term of imprisonment" in § 924(c) to hold that the phrase included state terms of imprisonment. *Id.* at 5-6. Along the way, the Court acknowledged that by the statute's plain terms, "§ 924(c) enhancements" must run "consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Id.* at 10. The government argues that this feature of § 924 proves that Congress could not have been concerned with "double counting." U.S. Br. 37. The fact that § 924(c) sentences must run consecutively, however, says nothing about the scope of the "except" clause, which, by definition, excludes some sentences altogether. And, again, it would not be unreasonable to decide that, once a certain minimum threshold punishment is reached, there is no need to tack on an additional mandatory minimum sentence.

IV. THE GOVERNMENT CONCEDES THAT ANY ALLEGED ANOMALIES CREATED BY § 924(C) CAN BE RESOLVED BY DISTRICT COURTS DURING SENTENCING

The government repeats the argument regarding anomalies made by the court of appeals, Pet. App. 15a-16a, which amounts to the contention that

avoiding supposed anomalies justifies ignoring the plain language of the "except" clause. See U.S. Br. 39-41. The government does not contend that anomalies arise because more culpable defendants will receive a shorter *total* sentence than less culpable defendants. Instead, the supposed anomalies arise because, under certain circumstances, less culpable defendants receive a lower mandatory *minimum* sentence than more culpable defendants. The government also claims that it is anomalous for a defendant to be convicted of § 924(c) but "receive no sentence for that offense." *Id.* at 39.

There are four separate problems with the government's argument. First, the government concedes that the alleged anomalies do not constitute the sort of "absurdities" that would justify ignoring the plain language of a statute. U.S. Br. 43. For this reason, the government is forced to argue that allowing district courts some sentencing discretion is inconsistent with the purpose of the act. The reason for the inconsistency, however, is the entirely circular one that the purpose of the act is to take away all sentencing discretion. See U.S. Br. 44.

Properly understood, § 924(c), including the "except" clause, limits a district court's discretion but does not eliminate it entirely. This result is hardly unusual in a federal sentencing scheme that consists of offenses with mandatory minimum sentences and others with no such minimums. Nor is it unusual in connection with § 924(c) itself. Section 924(c), after all, provides a mandatory minimum for the discharge of some weapons (such as handguns) but not others (such as machine guns), leaving additional penalties in the latter cases to the court's discretion. In addition, § 924(j), which applies to defendants who commit murder or manslaughter in the course of

violating § 924(c), does not impose a mandatory minimum sentence at all, leaving the sentence to the discretion of the district court.

Second, the government concedes that district courts can cure any supposed anomalies by relying on their authority under 18 U.S.C. § 3553(a) and provisions in the Sentencing Guidelines that have been in effect since the "except" clause was added to § 924(c) in 1998. See U.S. Br. 44-46. The government thus cannot dispute that more culpable defendants can easily receive longer total sentences than less culpable defendants, which is ultimately what matters in terms of fair and just sentencing. Indeed, the situation here is no more anomalous than the fact that refusing to testify before Congress carries a mandatory minimum sentence (one month of imprisonment), see 2 U.S.C. § 192, while second-degree murder carries no minimum sentence at all, see 18 U.S.C. § 1111(b). In both instances, the supposed "anomaly" disappears when one considers the total sentence—not merely the minimum—a defendant will receive in an actual case.

Third, the government is wrong to assert that anomalies would still arise if the "except" clause were limited to other firearms offenses. Under that reading of the "except" clause, only sentences for firearms offenses that are longer than the relevant mandatory minimum under § 924(c) would be included. Thus, defendants would be subject both to a sentence for the predicate offense *and* whatever higher mandatory minimum sentence could be imposed for use or possession of a firearm in the same transaction. The government claims there would still be an "anomaly" in this circumstance, but only because it assumes that the mandatory sentence for the firearms offense would run concurrently, rather

than consecutively, with the sentence for the predicate offense. See U.S. Br. 41. This assumption, however, is unwarranted, as district courts generally have discretion whether to impose sentences consecutively or concurrently. See 18 U.S.C. § 3584; *Gonzales*, 520 U.S. at 6-7.

Fourth, the government is wrong to claim that it is anomalous for a defendant to be convicted of violating a statute but receive no sentence. This happens whenever a defendant is convicted of a general offense and a lesser-included offense, and the legislature has not authorized cumulative punishments. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 864-865 (1985). It can also happen whenever a defendant is convicted of violating one subsection of this very statute. A defendant convicted of violating § 924(c)(1)(B)(ii) would necessarily also be guilty of violating § 924(c)(1)(A). While the defendant could be charged and found guilty of both offenses, see *ibid.*, even the government would concede that the defendant could not receive a sentence for violating § 924(c)(1)(A).

More generally, it is important to recognize that, contrary to the government's suggestion, defendants who are subject to the "except" clause are not being treated leniently or receiving a windfall. There is not a single mandatory minimum sentence—aside from 924(c)'s brandishing provision—that is greater than five years but shorter than ten. See USSC, *Overview of Statutory Mandatory Minimum Sentencing* at App. A. Thus, every defendant to whom the "except" clause applies because of a provision of law outside of § 924(c) necessarily faces a mandatory minimum sentence of at least ten years. These defendants will face even longer sentences, through the exercise of the district courts' discretion, if their crimes are

sufficiently serious to warrant additional time. Put simply, defendants to whom the "except" clause applies will nonetheless face stiff penalties that are tailored to their crimes.

V. THE GOVERNMENT'S SHIFTING INTERPRETATIONS OF THE "EXCEPT" CLAUSE OFFER FURTHER SUPPORT FOR APPLYING THE RULE OF LENITY IN THIS CASE

The government suggests that the rule of lenity can be applied only if there is a "grievous ambiguity or uncertainty in the statute." U.S. Br. 49 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-39 (1998)). This Court, however, has indicated otherwise, most recently endorsing "the familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling* v. *United States*, 130 S. Ct. 2896, 2932 (2010) (internal quotation marks omitted). The Court did not indicate that the ambiguity must be "grievous," but instead applied the rule of lenity to reject "the Government's less constrained construction [of a criminal statute] absent Congress' clear instruction otherwise." *Id* at 2933. See also *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408-409 (2003) (stating that criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity," and if "there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (internal quotation marks omitted); *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (stating that the rule of lenity should apply "where text, structure, and history fail to establish that the Government's position is unambiguously correct").

Regardless of the precise formulation of the rule of lenity, the government cannot prevail. As we argued in our opening brief, the plain language of the statute supports petitioner. Br. 13-21. Even if it did not, however, it could hardly be said that the government's reading of the statute is either unambiguously correct or free from ambiguity ("grievous" or otherwise). Indeed, the government's current interpretation *itself* is ambiguous, leaving unclear the precise scope of the "except" clause. See *supra* at 10-12.

The government's current reading of the statute, moreover, marks its third different interpretation in two years. See *supra* at 1, 14. These repeated interpretive shifts suggest a continual if fruitless search for a persuasive reason to disregard the statutory language that Congress actually used in the "except" clause. These shifting interpretations do not suggest, much less establish, that the government's current reading of the statute is free from ambiguity. To the contrary, the government's "less constrained" and implausible reading of the "except" clause is without basis in the text, history, or structure of the statute, and unless and until Congress provides "clear instruction otherwise," that reading must be rejected. See *Skilling*, 130 S. Ct. at 2932.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Nos. 09-479 and 09-7073

IN THE

Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Fifth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

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IN THE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioners.[1] The ABA

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any

requests this Court to hold that under the plain language of § 924(c), a defendant is exempt from the mandatory minimum sentences provided in § 924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of § 924(c) or under any other provision of law.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions. It includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

Since the ABA's inception, and as one of the cornerstones of its mission, the ABA has "work[ed] for just laws, including human rights, and a fair legal process."[3] The ABA Standards for Criminal Justice are among the ABA's most prominent efforts to improve the criminal justice system, including sentencing. Begun in 1964 under then-ABA President (and later Associate Justice) Lewis F. Powell, Jr., the ABA Standards were originally

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party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, available at http://www.abanet.org/about/goals.html.

published in 17 volumes, separated by topical area.[4] When the first full edition of the *ABA Standards* was issued, Chief Justice Burger called them "a balanced, practical work designed to walk the fine line between the protection of society and the protection of the constitutional rights of accused individuals." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-52 (1974).[5] The ABA has continued to develop and refine these Standards over the ensuing 42 years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public, and other groups that have special interests in the subject, as well as the diverse general membership of the ABA.[6]

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[4] A history of the development of the ABA Standards is available at http://www.abanet.org/crimjust/standards/home.html. See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the ABA Standards are developed and promulgated), which is available at the same website.

[5] The ABA Standards became official ABA policy only after they were approved by vote of the ABA's House of Delegates ("HOD"). The HOD is composed of more than 500 representatives from States and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards have been amended over the years by the same process. See *ABA General Information*, available at http://www.abanet.org/leadership/delegates.html.

[6] The ABA Standards have been referred to and adopted by courts, legislatures, and executive branch enforcement agencies. This Court has taken note of the ABA Standards when considering issues of criminal justice as well. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003); *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 440-41 (1986); *Spaziano* v. *Florida*, 468 U.S. 447, 463 n.8 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

Most recently, in response to Justice Anthony Kennedy's address to the ABA at its 2003 annual meeting, the ABA formed the Justice Kennedy Commission to investigate the state of the criminal justice system in the United States, including criminal sentencing, and to make recommendations for improvement. The Commission presented its report (the "*Kennedy Commission Report*") to the ABA House of Delegates at its 2004 annual meeting, where its recommendations were adopted as ABA policy.[7]

The issue in this case—how the "except" clause ("Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law") of 18 U.S.C. § 924(c)[8] is to be applied to

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[7] While the report bears Justice Kennedy's name, Justice Kennedy did not participate in the work of the Commission, nor did Justice Kennedy endorse or otherwise approve the positions taken in the report. The *Kennedy Commission Report* is available through the ABA's website: http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

[8] Section 924(c)(1)(A) of Title 18 of the United States Code, in full, provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

the mandatory minimum sentences set out in that statute—lies at the core of many policies articulated in the *ABA Standards* and the *Kennedy Commission Report*. These include the ABA's long-standing position that, while the use of a firearm in the commission of a crime should result in serious punishment, the resulting sentence should be no longer than necessary to serve society's goals and that judicial discretion must be retained throughout the sentencing process. The ABA believes that Congress struck the appropriate balance, reflected in that position, when it included the "except" clause in the 1998 amendments to § 924(c). The ABA respectfully suggests that its views on this issue, which are based on the perspectives of a broad range of practitioners and others who are involved with sentencing issues, will be of assistance to the Court in considering the question of statutory construction now before it.

SUMMARY OF ARGUMENT

In the 1998 amendments to § 924(c), Congress introduced an exception—commonly referred to as the "except" clause—to the required mandatory minimum sentences of § 924(c). Petitioners assert that, pursuant to the "except" clause, the mandatory minimums of § 924(c)(1)(A) are applicable except to the extent that a greater minimum sentence is "otherwise provided by this subsection or by any other provision of law."

The ABA supports petitioners' construction because—even apart from its fidelity to the plain language of the statutory text—it properly aligns § 924(c) with the con-

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(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

sensus view of the legal profession at the time of the 1998 amendments. When § 924(c) was enacted in 1968, it included judicial discretion to set the applicable mandatory consecutive sentence within stated ranges of years. This kind of "stacking" was not inconsistent with the legal profession's consensus views at that time. By 1998, however, judicial discretion to determine a sentence within a range of years had been replaced by the requirement to "stack" the applicable flat sentence on top of the mandatory minimum sentence contained in the other provision. During the same period, the consensus of the legal profession had hardened against mandatory minimum sentences, especially when "stacking" could result in overly harsh sentencing. The "except" clause of the 1998 amendments, accordingly, reflects a move toward the consensus, rejecting "stacking" where the subsection or another provision of law provided a mandatory minimum sentence that exceeded the minimum sentence provided in § 924(c)(1)(A), and restoring discretion so that judges could impose a sentence of greater severity under the other mandatory minimum sentence when warranted by the specific offense and offender.

Petitioners' construction of § 924(c), accordingly, remains faithful to Congress's intent to impose a harsh penalty for a crime of violence or drug trafficking involving firearms that is at least the minimum required under § 924(c), while allowing courts to impose a greater sentence that "is otherwise provided by § 924(c) or any other provision of law," where warranted to achieve society's purposes.

ARGUMENT

The "Except" Clause Aligns § 924(c) With Congressional Intent To Treat Applicable Crimes Severely And With The Consensus View Of The Legal Profession At The Time Of The 1998 Amendments.

Petitioners assert that, under the plain language of § 924(c), a defendant is exempt from the mandatory minimum sentences provided in § 924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of § 924(c) or under any other provision of law.[9] The ABA supports this construction because it is not only faithful to the statute's text, but also aligns § 924(c) with Congressional intent to treat drug crimes and crimes of violence that involve firearms seriously and with the legal profession's views on sentencing issues at the time of the 1998 amendments.

Petitioners construe § 924(c) to say "what it means and mean[] * * * what it says." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). As they explain, the "except" clause does not eliminate the mandatory minimum sentences set out in § 924(c). Rather, by giving meaning to all of the language in § 924(c), it ensures that possession or use, in any manner, of a firearm in connection with a crime of violence or a drug trafficking crime shall result in sufficiently serious punishment, while eliminating mandatory "stacking" of minimum sentences only where stacking would result in a sentence that is more than double the pertinent mandatory minimum set out in § 924(c).

This construction reflects the legal profession's consensus in 1998 regarding the propriety of mandatory minimum sentences and sentencing policy generally.

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[9] Section 924(c) is quoted in note 8, *supra*.

While the "except" clause did not eliminate mandatory minimum sentences, it nevertheless restored the element of judicial discretion (obedient, of course, to the dictates of other applicable statutes containing mandatory minimum sentences and the then-mandatory sentencing guidelines) to ensure that the sentence imposed is the sentence necessary to achieve society's goals.

A. Petitioners' Construction Is Consistent With The Legal Profession's Consensus In 1998, As Reflected In ABA Policies And Other Secondary Sources.

When Congress passed the Gun Control Act of 1968, P.L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*) (the "Act"), § 924(c) required courts to stack the applicable mandatory minimum sentence on top of a defendant's sentence for a predicate felony.[10] At that time, the mandatory minimum sentence was stated as a range of "not less than one year nor more than ten years" for a first qualifying conviction, and a term of "not less than two years nor more than twenty-five years" for a second or subsequent qualifying conviction. This was not inconsistent with the consensus of the legal community at that time, since § 924(c) required the courts to determine the number of years within these ranges that were to be imposed. For example, Standard 18-2.2 of the *ABA Standards for Criminal Justice, Sentencing Alter-*

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[10] As codified in 1968, § 924(c) stated:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

natives and Procedures (1st ed. 1968) ("*1968 Standards*"), provided, "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."[11] App., *infra*, 19a.

However, even in 1968, the legal profession was concerned with mandatory minimum sentences: Standard 18-3.2(a) of the *1968 Standards* cautioned that it was generally "unsound for the legislature to require that the court impose a minimum period of imprisonment." App., *infra*, 19a. The second edition of the *ABA Sentencing Standards* ("*1980 Standards*") repeated this caution in Standard 18-4.3(a). App., *infra*, 16a.

By the time the third edition of the *ABA Sentencing Standards* was published in 1994 (the "*1994 Standards*"), § 924(c) required a flat five, ten or thirty year consecutive sentence, based on the type of weapon, for the first qualifying conviction and higher flat sentences for subsequent qualifying convictions.[12] By that same time, the legal con-

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[11] This consensus was also reflected in a 1975 ABA policy in support of strengthening the Act, which stated that "the Judiciary [should] be encouraged to impose severe penalties, to the extent consistent with the American Bar Association [Standards for Criminal Justice], for the possession or use of a firearm or facsimile in the commission of a crime, as provided for by Section 924(c) of the Act." This policy was based on the conclusion that the Act was consistent with Standard 18-2.2. The *Report with Recommendation of the Section of Criminal Justice to the House of Delegates, 1975 ABA Annual Meeting*, is available from the ABA.

[12] In 1994, § 924(c)(1) stated:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United

sensus had hardened against mandatory minimums, and Standard 18-3.21(b) of the *1994 Standards* stated, "A legislature should not prescribe a minimum term of confinement for any offense." App., *infra*, 3a. This "long-standing [ABA] policy" was based on research showing that "fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors." Standard 18-3.21 Commentary, App., *infra*, 7a.

By the time Congress considered the 1998 amendments to § 924(c), this conclusion was echoed in many secondary sources. See, *e.g.*, Orrin Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185 (1993) ("Hatch"); United

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States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

States Sentencing Commission, *1991 Special Report to Congress: "Mandatory Minimum Penalties in the Federal Criminal Justice System"* (the "*1991 Sentencing Commission Report*").[13]

For example, Senator Hatch noted that in 1990, Congress had "formally directed the [U.S. Sentencing Commission] to study the effectiveness of mandatory minimum sentencing," Hatch at 192, and that its findings, as well as those of the congressionally chartered Federal Courts Study Committee and the Judicial Conference had "prompted a growing number of legislators to question the merit and efficacy of mandatory minimum sentences." *Id.* at 193. Senator Hatch also stated:

> A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purposes of sentencing articulated in the [Sentencing Reform Act of 1984].

Id. at 195.

Moreover, in the *1991 Sentencing Commission Report*, the United States Sentencing Commission, in reporting on the impact of mandatory minimum sentencing provisions on the federal criminal justice system and the federal prisons, summarized the positions of the Judicial Conference of the United States and the Federal Courts Study Committee, and its interviews with judges, assistant U.S. attorneys, defense attorneys, and probation officers. *1991 Sentencing Commission Report* at 54. Specifically:

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[13] The *1991 Sentencing Commission Report* is available at http://www.ussc.gov/r_congress/manmin.pdf.

- The Judicial Conference of the United States and the judges of twelve circuit courts of appeal had adopted resolutions that opposed mandatory minimums sentences, and in the Conference's formal resolution, it had urged Congress "to reconsider the wisdom of mandatory sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act." *Ibid.*
- The Federal Courts Study Committee, in its 1990 report, wrote: "Congress should repeal mandatory minimum sentence provisions[.]" *Id.* at 55.
- Of the interviews conducted, a preliminary finding was that "[a] majority of judges, panel attorneys and federal defenders are in favor of [mandatory minimum sentence] elimination and/or reduction for both drug distribution and possession of a firearm," while "[p]robation officers and especially U.S. attorneys show[ed] more support for the current system." *Id.* at 64. A second preliminary finding was that, "without exception, each of these groups would prefer [that Congress] raise sentences for individual offenses by some means other than mandatory minimum sentences." *Id.*[14]

While the ABA's *Kennedy Commission Report* was not presented until 2004, it also reflected these concerns,

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[14] The *1991 Sentencing Commission Report* also stated that the effect of mandatory minimum sentences on the federal prison population based on offenders sentenced during Fiscal Year 1990 was as much as an estimated 6,971 *additional* years of prison imposed, and between $79 million and $125 million of *additional* costs, above those attributable to the guidelines. *Id.* at 68.

as well as other social and fiscal results that were being confronted when Congress considered the 1998 amendments to § 924(c). After considering this report, the ABA adopted policy that included the following: "[T]he American Bar Association urges that states, territories and the federal government (1) Repeal mandatory minimum sentence statutes[.]" *ABA Report with Recommendation #121A* (Policy adopted Aug. 2004), available from the ABA.

This policy was based, *inter alia*, on the Commission's conclusions that mandatory minimum sentences had an overall tendency merely to shift sentencing discretion away from courts to prosecutors:

> Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Kennedy Commission Report at 27, citing David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 215 (2004); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentences*, 152 U. Penn. L. Rev. 33 (2003) (arguing that mandatory sentenc-

ing provisions also invade both the judge's and the jury's function). See also, Hatch at 195 ("mandatory minimums are basically a 'charge-specific' approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts"); *1991 Sentencing Commission Report* at 60 (of 46 Assistant United States Attorneys interviewed, 26 reported that they did not always charge a mandatory minimum even when it was warranted by the facts in the case).

The Justice Kennedy Commission also noted that, despite the increased number of people incarcerated and the increased costs from incarceration, it was unclear what effect increased incarceration had had on crime rates. For example, between 1991 and 2001, there was a 51.6% increase in the national incarceration rate and a 29.5% reduction in the crime rate, but in Texas, the incarceration rate rose 139% but the crime rate was reduced only by 34.1%, while in New York, the incarceration rate rose 10.9% and the crime rate was reduced by 53.2%. *Kennedy Commission Report* at 18.[15]

The Commission concluded that all sentencing options should be consistent with two principles that were at the core of the ABA's 1994 Standards: (1) unwarranted and inequitable disparities in sentencing between like offenses and offenders should be avoided; and (2) manda-

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[15] Nor did mandatory minimums ensure equal treatment of defendants. Instead, the Commission reported that statistics indicated that minority defendants were more likely to be charged with a mandatory minimum offense than whites. *Kennedy Commission Report* at 28-29 (discussing, *inter alia*, that California's "three strikes" rule had resulted in an incarceration rate for African-Americans that was 12 times higher than that for whites, while the Latino rate was 45 percent higher than that for whites).

tory minimum sentences should be avoided, so that sentencing courts may consider the unique characteristics of offenses and offenders that warrant an increase or decrease in sentence. *Kennedy Commission Report* at 26.

As reflected in the conclusions in Senator Hatch's article, the *1991 Sentencing Commission Report*, the *Kennedy Commission Report*, and the *1994 Standards*, it had become the legal profession's consensus view by 1998 that mandatory minimum sentences were neither necessary nor an appropriate means for meeting the goal of establishing serious penalties for serious crimes.

B. Petitioners' Construction Of The "Except" Clause Avoids Sentences That, As A Result Of Stacking Mandatory Minimum Sentences, Are Greater Than Necessary To Achieve Society's Goals.

Congress, of course, did not eliminate mandatory minimum sentences in the 1998 amendments. But petitioners' construction of the "except" clause is consistent with the consensus of the legal profession in 1998, as stated in the *1991 Sentencing Commission Report*, that Congress should "reconsider the wisdom of mandatory sentence statutes." *1991 Sentencing Commission Report* at 33; see also, *1994 Standards* 18-2.4, App., *infra*, 1a ("consistent with rational, civilized, and humane values," criminal sentences "authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized").

First, the "except" clause as construed by petitioners maintains harsh punishment for crimes of violence and drug trafficking crimes involving firearms, because courts can never impose a sentence that is less severe than the 5-, 7-, or 10-year sentence Congress deemed

necessary for the firearm offense. By its terms, the "except" clause is only operative where another statutory provision requires that the defendant receive "a greater minimum sentence" than the ones provided in § 924(c)(1)(A)(i)-(iii).

Second, where § 924(c) is applicable, the "except" clause as construed by petitioners recognizes that, when another minimum sentence exceeding the minimum provided by § 924(c)(1)(A) must be imposed, society's sentencing goals provide no basis on which to mandate additional punishment if those goals have been achieved already through the minimum specified for the predicate violation.[16]

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[16] Congress could not have overlooked the fact that, by 1998, the phrase "any other provision of law" would encompass myriad other laws. See, *e.g.*, Hatch at 192-193 (from 1984 to 1990, Congress enacted "an array of mandatory minimum sentences," turning "an occasional phenomenon" into "a decided trend" that resulted in "over one hundred separate mandatory minimum penalty provisions," but Congress had recently "begun to reconsider the merits of these statutes."). In 1998, the offenses carrying mandatory minimum sentences included:

10-year minimum: 21 U.S.C. § 841(b)(1)(A) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 841(b)(1)(B) (1998) (second offense: manufacturing, distributing, or possessing with intent to distribute smaller amounts of certain controlled substances); 21 U.S.C. § 960(b) (1998) (first offense: unlawful import or export of narcotics); 18 U.S.C. § 2113(e) (1998) (taking hostage during bank robbery or escape from bank robbery).

20-year minimum: 21 U.S.C. § 841(b)(1)(A), (B), & (C) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances, if death results); 21 U.S.C. § 841(b)(1)(A) (1998) (second or subsequent offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 848 (1998) (first offense: continuing criminal narcotics enterprise); 21 U.S.C. § 960(b) (1998) (first offense:

Finally, the "except" clause as construed by petitioners restores discretion to the judiciary to individualize a sentence that may be greater than the minimum provided by § 924(c)(1)(A), where greater severity is warranted to achieve society's purposes. It is the court that crafts the sentence so that it is "sufficient, but not greater than necessary," taking into account, among other things, "the nature and circumstances of the offense and the history and characteristics of the offender." 18 U.S.C. § 3553(a). See also *1994 Standards* 18-2.4, App., *infra*, 1a (severity), 18-3.2, App., *infra*, 1a (consideration of mitigating factors), and 18-3.3(b), App., *infra*, 2a (consideration of aggravating factors).

In short, the ABA supports petitioners' construction of § 924(c) because it is faithful to the plain language of the statute and also strikes the appropriate balance between assuring that a defendant receives warranted punishment and ensuring that the sentence, as determined by the trial court, is no more severe than necessary to achieve the societal purposes the sentence is intended to serve. As stated by the Second Circuit, it is not inconsistent with the purpose of enhancing firearms penalties for Congress to provide "a series of increased minimum sentences and also to have made a reasoned judgment

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unlawful import or export of narcotics, if death results); 21 U.S.C. § 960(b) (1998) (second or subsequent offense: unlawful import or export of narcotics); 18 U.S.C. § 1121(b)(1) (1998) (murder of state correctional officer in performance of officer's duties); 18 U.S.C. § 2113(a) (1998) (bank robbery); 21 U.S.C. § 848 (1998) (murder of law enforcement officer during continuing criminal narcotics enterprise); 49 U.S.C. § 46502(a)(2) (1998) (aircraft piracy).

25-year minimum: 18 U.S.C. § 2113(e) (1998) (assault or use of dangerous weapon or device in commission of bank robbery).

30-year minimum: 21 U.S.C. § 848 (1998) (second and subsequent offenses: continuing criminal narcotics enterprise).

that where a defendant is exposed to two minimum sentences, * * * only the higher minimum should apply." *United States* v. *Whitley*, 529 F.3d 150, 155 (2d Cir. 2008). This balance also reflects the consensus of the legal profession regarding mandatory minimum sentences at the time of the 1998 amendments.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgments of the Third and Fifth Circuits be reversed.

Respectfully submitted.

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APPENDIX A

The *ABA Standards for Criminal Justice, Sentencing* (3d ed. 1994), provide in relevant part as follows:

* * * * *

Standard 18-2.1 Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

* * * * *

Standard 18-3.2 Mitigating factors

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

* * * * *

Standard 18-3.3 Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offense.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sen-

tences within the range and, if the factors are substantial, in departing upward from the range.

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Standard 18-3.21 Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same con-

duct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive dates of release or in considering the release date of a specific individual, the provisions in this standard.

History of Standard

The third edition's treatment of total confinement differs in a number of ways from the prior edition's.[1] First,

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[1] *See generally* former Standards 18-2.5, 18-4.1 through 18-4.3, and 18-4.7 (2d ed. 1979).

the former Standards advocated a system of relative indeterminacy in incarcerative sentences. Former Standard 18-4.1 stated that the legislature "should exercise caution in curtailing indeterminacy" and recommended retention of an "early release mechanism independent of the sentencing court." The present Standards would allow for early release only in jurisdictions that fail to create an adequately determinate sentencing structure.[2] Further, the prior Standards retained the indeterminate device of maximum and minimum terms of total confinement, and suggested that the "proportion of indeterminacy in the sentence [should] increase as the sentence's length increases."[3] In contrast, this edition's conception of presumptive sentences does not allow for widely divergent maximum and minimum terms, and treats disparity as undesirable for sentences of all lengths.[4]

The second edition endorsed the idea of an "extended sentence" for dangerous or habitual offenders, where sufficient proof of future dangerousness was assembled.[5] The current Standards disfavor sentences based on such projections of future conduct.[6]

Former Standards 18-2.1(e) and 18-2.5(b), in black letter, expressed views concerning the appropriate overall levels of incarceration in this country, circa 1979. For this edition, the drafters believed that such issues, which change year by year, should be addressed in the

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[2] *See* Standards 18-3.21(g) and 18-2.5.

[3] Former Standards 18-4.2 (2d ed. 1979) (Maximum term); 18-4.3 (Minimum term); 18-4.1(b) (General principles; indeterminacy).

[4] *See* Standards 18-2.5 and 18-3.1.

[5] Former Standard 18-2.5(b)(i) through (v) (2d ed. 1979).

[6] *See* Standard 18-3.5 and Commentary.

Introduction and Appendix rather than in a black-letter Standard.

Paragraph (e) of this Standard, concerning good time credit, departs from the prior edition, which expressly took no position on that subject.[7]

Paragraph (f) of this Standard, regarding credits against sentences to total confinement, is a streamlined restatement of former Standard 184.7.

Related Standards

The conditions necessary for the imposition of a sanction of total confinement are set out in Standards 18-3.12(c) and 18-6.4(a). Paragraph (b) of this Standard should be read in conjunction with Standard 183.11(c).

Commentary

Paragraph (a) provides that the legislature should make the sanction of total confinement available in all cases involving an individual offender. Given the scope of this chapter, the statement in paragraph (a) is circular: As set out in Standard 18-1.1(a), the chapter does not extend to those minor offenses for which only nonincarcerative sanctions are provided.[8]

Paragraph (b) continues long-standing ABA policy that the legislature should not prescribe mandatory terms of total confinement for any offense. The length of incarceration for individual offenders is better addressed through shared efforts of the sentencing agency, which

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[7] *See* former Standard 18-4.7(g) (2d ed. 1979).

[8] The Standards' scope includes offenses typically classified as felonies and misdemeanors. Although such classifications and the relevant penalty structures differ across jurisdictions, the drafters intended the Standards to address sentencing for offenses carrying maximum incarcerative penalties of six months or more. Standard 18-1.1(a).

can consider severity issues from a systemic perspective, and sentencing courts, which can exercise individualized discretion in appropriate cases. "It is a fundamental precept of the Standards that fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors."[9]

Beyond this, experience with mandatory minimum terms of total confinement has demonstrated that the goal of uniformity in sentencing is ill served by such laws. There is uncontroverted evidence that prosecutors' charging discretion, the vicissitudes of the plea bargaining process, and the heightened reluctance of juries to convict when penalties are inflexibly severe, all contribute to patterns of irregular enforcement of mandatory minimum provisions.[10] A recent study of such federal laws conducted by the United States Sentencing Commission reached the further disturbing conclusion that uneven enforcement works particularly to the disadvantage of nonwhite offenders.[11] Paradoxically, in practice,

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[9] *See* Standard 18-2.6.

[10] *See* UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Special Report to Congress, August 1991) (finding a lack of uniform application and unwarranted disparity in sentencing under the more than 60 federal statutes containing mandatory minimum penalties); Michael Tonry, *Mandatory Penalties*, *in* 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 1992) (surveying history of mandatory sentencing provisions).

[11] UNITED STATES SENTENCING COMMISSION, *supra* note 10, at ii, 76-82. On the subject of race-based and other disparities, the Commission reported:

> Disparity may be entering the federal criminal justice system through mandatory minimums in two ways: defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon

the seeming blanket uniformity of mandated terms exacerbates the worst features of disparity in the system.

One argument offered in favor of mandatory minimum sentencing laws is that they can control judicial discretion when, in the view of the legislature, the courts would otherwise be too lenient in sentencing decisions. Much of this argument evaporates, however, in the system of determinate, presumptive sentences advocated by these Standards. Presumptive sentences established by the sentencing agency, with the oversight of the legislature, set forth baseline penalty levels for all offenses. The experience in all state guidelines systems is that judges follow such guidance in the vast majority of cases. Further, as a legal matter, the courts' departure power is not unconstrained, and is subject to appellate review. Thus, systemic decisions regarding appropriate harshness of penalties can be implemented and enforced, while still leaving space for cases that demand individualized treatment.

In drafting the new edition of these Standards, the Task Force and Standards Committee recognized that most or all American jurisdictions have sentencing provisions inconsistent with the terms of paragraph (b). Indeed, the current trend appears to be in the direction of enacting *additional* mandatory minimum sentencing laws. As observed by Professor Tonry, the political and symbolic appeal of such measures can overwhelm the empirical and historic evidence that they do not serve

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such factors as race, circuit, and prosecutorial practices; and defendants who appear to be quite different with respect to distinguishing characteristics (*e.g.*, role and nature of the offense) receive similar reductions in sentences below the mandatory minimum provisions.

Id. at 89.

their expected ends.[12] For the Standards' drafters, the sharp divide between policy analysis and the current political atmosphere posed the following question: Can the ABA announce a "standard" for criminal justice that few or no jurisdictions now follow? In most settings such a concern would militate against the adoption of black-letter policy. In the case of mandatory minimums, however, the drafting groups concluded that no credible defense of such laws can be offered, and their acknowledged political and symbolic benefits do not overcome the operational defects exposed by long experience.

Paragraph (b) must be read alongside Standard 18-3.11(c), which provides: "The legislature should not mandate the use of the sanction of total confinement unless the legislature can contemplate no mitigating circumstance that would justify a less severe sanction." Standard 18-3.11(c) contemplates that for a very narrow group of crimes, the legislature may provide that *some* period of incarceration is a necessary part of the overall sentence, without fixing a required length of term. Where such commands are made, the sentencing agency and courts establish the duration of total confinement. The sentencing agency, however, would not be free to create a presumptive sentence without a component of total confinement, and the sentencing court could not fashion a departure sentence lacking any term of total confinement.

Paragraph (c) highlights the role of the sentencing agency in providing guidance to sentencing courts in the

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[12] Tonry, *supra* note 10, at 270.

appropriate use of total confinement.[12] Elsewhere the Standards explore in some detail the concerns that should influence the agency in promulgating such guidance. Many of these concerns drive judicial decision making, as well.[14] Standard 18-3.12(c) outlines necessary conditions for imposition of any term of total confinement.[15] Standard 18-3.12(a) and (b) speak more generally to policies relating to the selection of some types of sanctions over others in presumptive sentences.[16] On the issue of sentence severity, Standard 18-2.4 states that "[s]entences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."[17] Standard 18-2.3 recognizes the factor of cost in overall confinement policy, and states that "the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and

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[12] Similar provisions exist for all other sanctions discussed in this chapter. *See* Standards 18-3.13(c) (compliance programs for individuals), 18-3.14(c) (compliance programs for organizations), 18-3.15(c) (restitution or reparation), 18-3.16(c) (fines), 18-3.17(c) (community service), 18-3.18(c) (acknowledgment sanctions), 18-3.19(c) (intermittent confinement in a facility), and 18-3.20(c) (home detention).

[14] Standard 18-6.4 traces the intellectual steps a sentencing judge should take before pronouncing a sentence that includes a term of total confinement.

[15] The conditions of Standard 18-3.12(c) are echoed in Standard 18-6.4(a).

[16] For example, Standard 18-3.12(a)(ii) states that the sentencing agency should recognize that "[s]anctions other than total confinement may serve to punish and incapacitate offenders."

[17] Sentencing courts are directed to the same precept in Standard 18-6.1(a).

jail system of the state."[18] Similarly, for states with sentencing commissions, Standard 18-4.4(c)(i) directs the legislature to require that "the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations."[19]

Paragraph (d) provides that, as a matter of statutory law, individuals sentenced to total confinement should be committed to the custody of the department or bureau charged with operation of the prison or jail system. As with all other sanctions, there is a need to designate the governmental agency with ongoing responsibility for supervision of an offender during the term of his sentence. Unlike other sanctions, however, the unique degree of control associated with total confinement demands that jurisdiction over the offender be transferred from the sentencing court to correctional authorities.

Under the view of determinacy advocated by this chapter, sentences served should bear close proximity to sentences imposed.[20] Unwarranted disparities in individual punishment, and serious systemic distortions, can occur if release decisions from total confinement

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[18] Standard 18-2.3(e). This is not to say that states may not adopt confinement programs that expand existing prison and jail capacities. Such policies are permissible under these Standards so long as the legislature appropriates the necessary resources. *See* Standard 18-2.3 and Commentary.

[19] Cost concerns are best addressed on the systemic rather than the case-specific level. Thus, there is no analogue to the resource-sensitivity provisions of Standards 18-2.3 and 18-4.4 in the Standards applicable to judicial discretion.

[20] *See* Standards 18-2.5 and 18-4.4(c).

eventuate in widely divergent sentences served. Despite this concern, the Standards' drafters recognized that institutional discipline and morale require that incarcerated inmates have palpable incentive to cooperate with prison and jail officials. Paragraph (e) therefore asserts that the legislature should provide for substantial "good time" credit toward service of sentences to total confinement. While the word "substantial" is not quantified in black letter, the drafters thought that potential good time credit in the range of 15 to 25 percent would satisfy the requirement. To preserve the integrity of sentences imposed, and limit the possibility of disparate release decisions, paragraph (e) further states that the legislature should determine a specific formula for the awarding of good time credit.

Paragraph (f) addresses a panoply of situations in which the effective length of a current sentence to total confinement should be adjusted to take account of time the offender has previously served in custody. The legislature should provide that the department or bureau assuming custody of the offender make such calculations in setting a release date.

The Standards have long asserted that there should be no distinction in treatment between time served in custody before and after conviction or sentencing.[21] All incarcerative experiences of offenders stemming from the current offense should be counted toward service of any final sentence pronounced by the sentencing judge. Subparagraph (f)(i) reaffirms this view. Subparagraph (f)(ii) extends similar reasoning to circumstances in which an offender's conviction or sentence has been overturned on

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[21] *See* former Standard 18-4.7 (2d ed. 1979); former Standard 18-3.6 (1st ed. 1969).

review, but where the offender eventually receives a new sentence for the original offense conduct. Such scenarios can occur in a number of ways: A reviewing court may invalidate a sentence and remand for resentencing; alternatively, a reviewing court may invalidate a conviction and remand for further proceedings that result in reconviction for the same offense or for a different offense arising from the same criminal conduct-again presenting the offender for a resentencing. Subparagraph (f)(ii) is intended to reach the full variety of processes that can produce a new sentence for conduct that had given rise to a prior sentence.

Subparagraph (f)(iii) extends to situations where an offender has been incarcerated subsequent to the instant offense conduct, but where the custody was based on arrest for a different charge. In some cases, under subparagraph (f)(i), such periods of confinement will be credited against a total confinement sentence for the other charge. Where such credit has not been given, however, subparagraph (f)(iii) would award credit against the instant sentence. This is sensible for a number of reasons. From the offender's experiential point of view, incarceration is incarceration, regardless of the formal legal basis for its imposition at any moment in time.[22] Further, it is not unknown for pretrial detention to be predicated on charges different than those reflected in the ultimate conviction and sentence. It elevates form over substance to ignore such periods of custody, when they occur after the offense of conviction, simply because the eventual prosecution embarked in an alternate direction. Finally,

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[22] It does not make sense, on the other hand, to bestow credit for periods of incarceration that occurred before the instant offense. Such a policy would allow offenders to "bank" confinement credits against future charges.

from a public policy perspective, the purposes of sentencing are overserved if the actual length of an offender's confinement exceeds that deemed justified by the sentencing court. This is both an unnecessary use of resources and a violation of the principle of parsimony embodied in Standard 18-2.4.

The final provision of paragraph (f) applies to circumstances where an offender has been sentenced for multiple offenses and one or more of the convictions or sentences is overturned on review. In such circumstance, if that reprosecution or resentencing does not occur on the challenged counts, credit should be awarded against any remaining sentence of total confinement for convictions untouched on review. As a practical matter, this provision has import only for consecutive sentences, which are disfavored by the Standards and should occur infrequently.[3] Where multiple convictions give rise to a consolidated sentence, as recommended in Standard 18-3.7, or a concurrent sentence under traditional practice, the time served by an offender for an invalidated sentence will already have been credited against the sentence left intact on review, irrespective of the final provision of paragraph (f).

Paragraph (g) is addressed only to jurisdictions that fail to create a sentencing system that meets the basic requirement of determinacy in Standard 18-2.5. Briefly stated, that Standard defines adequate determinacy in terms of the ability of systemic actors to predict, control, and manipulate future sentencing patterns with reasonable accuracy, and in terms of the success of the system in imposing sentences that are reasonably uniform, so that unwarranted disparities in individual sentences are

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[3] *See* Standards 18-3.7, 18-6.5 and Commentary.

avoided.[24] Because the determinacy Standard is foundational to the overall functioning of the sentencing system, jurisdictions that fail to comply with Standard 18-2.5 will operate in nonconformity with the bulk of the Standards contained in this chapter.[25] Still, such jurisdictions now exist in substantial numbers. For states that adhere to the traditional system of indeterminate sentencing, or follow determinate schemes that fail to satisfy the components of Standard 18-2.5, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released.

The logic of paragraph (g) is that, where jurisdictions lack "front end" control over the use of scarce prison resources, as achieved through an effectual determinate sentencing system, recourse must instead be made to "back-end" control. Historically, adjustments to overcrowding have occurred through parole release or emergency release mechanisms. Many states today, when correctional facilities cannot support sentences imposed, must resort to such back-end measures. The Standards Committee, while clearly opposed to regimes of indeterminate sentencing,[26] recognized that, in such systems, a release authority with substantial discretion over the length of sentences served is an indispensable player in the sentencing structure.

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[24] For a fuller discussion, see Standard 18-2.5 and Commentary.

[25] On the fundamental importance of the determinacy Standard, see Standards 18-2.5, 18-2.6 and Commentary.

[26] *See* Standard 18-2.5 and Commentary.

APPENDIX B

The *ABA Standards for Criminal Justice, Sentencing* (2d ed. 1980), provide in relevant part as follows:

* * * * *

Standard 18-4.3 Minimum term.

(a) Because there are so many factors in an individual case which cannot be assessed in advance and because a guideline drafting agency can respond to changed circumstances and factual complexity with greater flexibility and precision than can the legislature, it is unsound for the legislature to prescribe a minimum or mandatory period of imprisonment.

(b) In order to mitigate the possibility of excessive severity and to preserve a meaningful system of early review, a sound sentencing structure should require the proportion of indeterminacy in the sentence to increase with the sentence's length. The following standards are recommended as boundaries on the extent of indeterminacy which is desirable:

(i) In the case of short-term sentences (*e.g.*, those having a maximum term of three years or less), little justification exists for a substantial ranges between the minimum and maximum terms, and "flat time" sentences should be authorized but not required.

(ii) In the case of intermediate-range sentences (*e.g.*, those having a maximum term between three and ten years), a "flat time" sentence should not authorized, and the margin between the minimum and maximum term should be required to increase as the maximum term imposed increases. A ceiling on the maximum degree of indeterminacy permitted within this intermediate range is also

desirable to curtail the frequency of sentences as open-ended as one to ten years and to minimize the disparity which results when offenders sentenced for offenses of moderate severity obtain early release prior to the expiration of "flat time" sentences imposed for less serious offenses; and

(iii) In the case of long-term sentences (*e.g.*, where the term imposed exceeds ten years), periodic review by the agency administering early release should being no later than the tenth year or such earlier date as would be more reasonably related to the longest minimum term recommended by guidelines adopted under subparagraph (b)(ii) above.

(c) Substantial minimum terms are generally inappropriate. Authority to impose a minimum term should be circumscribed by the following limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to standard 18-2.1(a) the highest minimum period of confinement which can be imposed, and the guideline drafting agency should establish presumptive ranges within that limit depending on the circumstances of the offense and the offender;

(ii) Minimum sentences as long as ten years should only be employed in exceptional cases, and longer minimums should not be authorized by the legislature;

(iii) The court should not be authorized to impose a minimum sentence until a presentence report (standards 18-5.1 to 18-5.5), supplemented where necessary by report of the examination of the defendant's mental, emotional, and physical

conditions (standard 18-5.6), has been obtained and considered.

* * * * *

APPENDIX C

The *ABA Standards for Criminal Justice, Sentencing* (1st ed. 1968), provide in relevant part as follows:

* * * * *

Standard 18-2.2 General principle: judicial discretion.

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

* * * * *

Standard 18-3.2 Minimum term.

(a) Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parole eligibility upon service of a specified portion of the maximum term.

(b) While recognizing that there are in addition substantial arguments against judicial authority to select and impose minimum sentences, a majority of the Advisory Committee would support a statute which authorized but does not require the sentencing court to impose, within carefully prescribed legislative limits, a minimum sentence which must be served before an offender becomes eligible for parole.

(c) Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;

(ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

(iii) In order to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;

(iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered;

(v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);

(vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to

protect the public from further criminal conduct by the defendant;

(vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time served upon motion of the corrections authorities made at any time.

* * * * *

AMICUS CURIAE BRIEF

No. 09-479, 09-7073

In The Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fifth Circuits

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit organization whose primary mission is to promote fair and proportionate sentencing policies by challenging excessive penalties required by inflexible mandatory minimum sentencing laws. FAMM also works to illuminate the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM's interest lies in ensuring that courts construe and apply mandatory minimum sentencing laws in a manner consistent with statutory and constitutional principles. Through education and selected amicus filings in important cases, FAMM works toward realizing its vision of a nation in which sentencing is individualized, humane, and sufficient, but not greater than necessary, to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

Properly understood and applied, the "except" clause of 18 U.S.C. § 924(c) represents a step in that direction. FAMM files this brief because it believes that the decisions of the Third and Fifth Circuits in

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Consent letters have been lodged with the Clerk of the Court.

these cases are contrary to the correct interpretation of this statute, good public policy, and the welfare of its members. Those members include Percy Dillon and Mandy Martinson, whose stories are recounted within. Both Dillon and Martinson were sentenced to a mandatory five-year prison term under Section 924(c) over and above the mandatory minimum term applicable by virtue of their drug trafficking convictions under 18 U.S.C. § 841. Unless this Court reverses the decisions below, and if Mr. Dillon does not win his case in this Court,[3] both he and Ms. Martinson, and others like them, will spend a far longer time in prison than is fair or necessary based in part on the Government's flawed understanding of Section 924(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the proper interpretation of 18 U.S.C. § 924(c)(1)(A) (2006). Section 924(c)(1)(A) provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime

[3] *See Dillon* v. *United States*, No. 09-6338 (U.S. argued Mar. 30, 2010).

> (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.[3]

As Petitioners rightly argue, the plain language of this "except" clause makes the minimum and consecutive features of this penalty non-mandatory if a longer mandatory minimum is imposed at the same sentencing. Abbott Br. 13-36; Gould Br. 7-15. By its terms, Section 924(c) unambiguously declares that the mandatory minimum sentences it authorizes for specified gun offenses do not apply when "a greater minimum sentence is otherwise provided . . . by any other provision of law." Both Petitioners received "greater minimum sentences . . . otherwise provided . . . by any other provision of law." Hence, the "except" clause exempts them from a second but lesser mandatory minimum sentence under Section 924(c). This Court consistently ends its analysis with a

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[3] When Section 924(c)(1)(A) refers to "this subsection" it means the whole of Section 924(c) and its many paragraphs and subparagraphs, including paragraph (c)(5), which contains an "except" clause identical to the one in (c)(1)(A).

statute's plain language when that language is clear, *Badaracco* v. *Comm'r*, 464 U.S. 386, 392 (1984) (noting that where "provisions appear to be unambiguous on their face," their "clear language" controls), unless it "would produce an absurd and unjust result which Congress could not have intended," that is, one that is supported by "no plausible reason." *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted); Gould Br. 7. Petitioners also rightly argue that, unless "the Government's position is unambiguously correct, [this Court] appl[ies] the rule of lenity" to resolve doubts in favor of defendants. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); Abbott Br. 37; Gould Br. 37.

In the face of such arguments, the Government contends that Petitioner's interpretation of the "except" clause is anomalous, illogical, and clearly incorrect. *See* Petition for a Writ of Certiorari at 16-17, *United States* v. *Williams*, No. 09-466 (filed Oct. 20, 2009). This brief addresses the good – and certainly plausible – reasons that Congress would have had for amending Section 924(c)(1)(A) in 1998 to limit its applicability to cases in which a longer mandatory minimum does not also apply. These reasons lend additional support to Petitioners' ample plain-language arguments. They also confirm that the Government's position cannot be unambiguously correct and that therefore, at least, the rule of lenity applies.

Congress had at least two good reasons for moderating the severity of the statute's punishments when it extended its application to one who "possesses a firearm . . . in furtherance" of a crime of violence or drug trafficking crime in 1998. *First*, by 1998 empirical studies had established that it is the relative certainty of detection and penalty rather than the increased severity of punishment that effectively deters crime. All people – especially potential criminal offenders – discount possible future punishment. Studies of state laws similar to Section 924(c) had by 1998 found that additional enhancements have no discernible impact on the rate of violent crime. Congress was aware of these studies, explicitly discussed the concept reflected in them, and as a result had enacted laws ameliorating other mandatory minimum sentences in the 1990s. Hardly absurd, Petitioners' construction of the "except" clause is entirely consistent with an emerging consensus that severe and rigid sentencing approaches were producing anomalous results, leading Congress to take its first halting steps toward sentencing reform.

Second, while Congress indisputably favors incarcerating dangerous persons, it cannot be presumed to embrace the draconian regime that the Government advocates. By 1998, studies had shown that people become dramatically less likely to commit crimes – including weapons violations – as they grow older. It is consistent with prior congressional action, and certainly plausible, that Congress wanted to

ensure that Section 924(c) did not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

If this Court does find the statute's language to be unclear, it ought to apply the rule of lenity and resolve the issue in favor of Petitioners. This brief presents plausible reasons for the "except" clause's limit on multiple mandatory minimums. These reasons, based on empirical data, literature, and congressional action, create sufficient doubts about the Government's position to justify lenity.

ARGUMENT

I. THE "EXCEPT" CLAUSE REFLECTS AN EMERGING CONSENSUS THAT CERTAINTY OF PUNISHMENT, RATHER THAN SEVERITY, DETERS CRIME

By its language, Section 924(c)(1)'s "except" clause plausibly reflects congressional choice. At the same time it was making sure that those convicted of possessing a gun in furtherance of a crime would serve a substantial mandatory sentence, Congress may reasonably have chosen, in 1998, to mitigate Section 924(c)(1)'s rigor by creating an exception where another longer mandatory minimum already applied. Cognizant of case studies and empirical data, and consistent with its own stated concerns regarding the severity of mandatory minimums, Congress may

have purposefully included the "except" to ensure that people did not face significantly longer sentences than needed to achieve Congress's real purpose: deterrence.

Congress originally enacted 18 U.S.C. § 924(c)(1) in 1968, to deter potential criminals from using firearms when committing federal crimes. In the floor debate over passage of the Gun Control Act of 1968, Representative Richard Poff explained that the purpose of the Section 924(c)(1) amendment to the bill was to persuade an offender to "leave his gun at home." 114 Cong. Rec. at 22,231. The amendment carried a one-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1) (1970). The 1998 amendments that created the "except" clause at issue were primarily a response to *Bailey* v. *United States*, 516 U.S. 137 (1995), in which this Court held that mere possession of a firearm could not be punished as "use" of a firearm, which the statute proscribed. The amendments extended Section 924(c)'s penalties to possession in furtherance of a drug-trafficking or violent crime, and added longer graduated mandatory minimum sentences of five, seven, or ten years, depending on whether the firearm was possessed, used, or carried in the commission of the crime, or was brandished or discharged. 18 U.S.C. § 924(c)(1) (2006). Congress explained that the amendment sent a signal: "If you possess a gun in any way to further your violent criminal behavior, you get *a minimum of five years* in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the*

Judiciary, 105th Cong. (1997) (statement of Sen. Helms) (emphasis added), *available at* 1997 WL 235726.

While Congress indisputably wanted to ensure that those who used a gun in committing the designated crimes would spend "a minimum of five years in the slammer," there is no reason that Congress would have favored imposing that mandatory minimum on top of another harsher one. By 1998, National Academy of Sciences studies had repeatedly found that crimes are deterred by perceived certainty of detection and penalty rather than increased severity of punishment. In light of these studies, Congress could have been expected to respond reasonably by including the "except" clause in Section 924(c) to ensure that people did not face significantly harsher punishments than needed to deter.[4]

A. It Is the Certainty of Punishment, Not the Severity, that Deters Crime

As one commentator has noted, "Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed

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[4] Thus, for example, the reference to mandatory minimums "otherwise provided by this subsection" served to modify and partially overrule this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993).

by Republican presidents, reached that conclusion, as has every major survey of the evidence. This is also the belief, in my experience, of most experienced judges and prosecutors." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) (citing National Academy of Sciences reports from 1978, 1986, and 1993). By 1998, empirical studies had revealed this sociological truth – increases in penalties for crimes have little deterrent impact "in many situations where officials place great faith in such increases." Franklin E. Zimring & Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* 203 (1973) (discussing prior studies); *see generally* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65 (2009) (reviewing pre-1998 research). Numerous studies before 1998 had shown that it is the certainty rather than the severity of punishment that is most effective in deterring a criminal act. *See, e.g.*, Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 Econ. Inquiry 297, 297, 308 (1991) (finding that greater certainty of being held accountable resulted in large deterrent effects, while an increase in the severity of punishment had an insignificant effect); Philip J. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 2 Crime & Just. 211, 231 (1980) (concluding same based on economic analysis); Charles H. Logan, *General Deterrent Effects of Imprisonment*, 51 Soc. Forces 64, 64 (1972) (finding same).

One explanation for the negligible role that severity of punishment plays in deterrence is the phenomenon of discounting. Simply stated, "each added year in a criminal sentence has a decreasing marginal deterrent effect on crime because criminals (like other people) discount harms that await them far in[to] the future." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1525 n.92 (2009) (summarizing earlier research). Indeed, most criminals are more focused on the present than the average person. A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 4 (1999) (citing James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 416-21 (1985)). Because they tend to care more about short-term consequences and less about long-term risks than the average person, those charged with crimes are even less likely to be deterred by longer prison sentences. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 221 (2007) (summarizing earlier research).

What the studies cited above confirm, is that by the time Congress enacted the "except" clause in 1998, the importance of certainty as opposed to severity had become far clearer. Congress, reflecting the larger shift in understanding, could reasonably have taken into account the diminishing returns of increased severity in deciding to include the "except" clause.

B. Empirical Studies of Similar State Laws Show that Firearms Enhancements Have Little or No Deterrent Effect

The understanding of the relative efficacy of certainty and severity in deterring crime evolved between 1968 and 1998 in the specific context of state law sentencing enhancements for firearm possession similar to the mandatory sentence required in Section 924(c)(1). Between 1968 and 1998, a number of empirical studies assessed the impact of these statutes on crime. These studies consistently found that enhanced sentences tied to gun possession or use in the commission of a crime have little or no deterrent effect.

An expansive study undertaken in 1995 analyzed data from almost every state in an effort to determine the effectiveness of sentencing enhancements for firearm possession in felony commissions. Thomas B. Marvel & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 Criminology 247 (1995). After analyzing almost twenty years of data, most of the enhancement statutes were shown to have had no measurable impact on gun-related crimes.[8]

This result replicated the results of two more detailed studies from the early 1980s of the impact of

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[8] The study showed decreases in certain violent crimes in a few states, which were offset by increases in crime in other states. *Id.* at 275.

mandatory consecutive sentence enhancements on violent crime rates in Michigan and Florida. In 1977, Michigan enacted a felony firearm statute, known as the Gun Law, that was very similar to Section 924(c)(1). *See* Mich. Comp. Laws. § 750.227b (1977). It provided a two-year mandatory consecutive sentence enhancement for any felony committed while possessing a firearm. In 1983, a study assessed the impact of the Gun Law on violent crime rates in Detroit, a city in which the Gun Law was both highly publicized and vigorously enforced. Colin Loftin et al., *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 Law & Soc'y Rev. 287 (1983). Looking at crime data for the years 1976 through 1978, the study found that the Gun Law had had no discernible effect on the number or rate of violent crimes committed in Detroit. *Id.* at 309.

Two of the authors of the Michigan study next turned their attention to the Florida felony firearm law. Colin Loftin & David McDowall, *The Deterrent Effects of the Florida Felony Firearm Law*, 75 J. Crim. L. & Criminology 250 (1984). Enacted in 1975, the statute imposed a three-year mandatory minimum for any felony committed while possessing a firearm. Fla. Stat. § 775.087(2) (1976). Similar to the Michigan study, the Florida statute was found to have no measurable effect on violent crime deterrence. Loftin & McDowall, *supra*, at 258. The authors, after interviewing incarcerated felons, gave two reasons for the law's ineffectiveness. First, offenders discounted

the additional firearm sentence on top of the already substantial punishment for the underlying felony conviction, so they subjectively perceived no increase in severity. Second, the firearm enhancement did not offset the benefit to the offender that the gun provided for both protection and commission of the crime. *Id.* at 258-59.

C. The "Except" Clause Reflects Congress's Shift in Attitude Towards Increased Severity of Mandatory Minimum Sentences

Both this Court and Congress often look to the states as laboratories for development of the law. Congress's inclusion of the "except" clause in Section 924(c)(1) is consistent with the general deterrence literature and experience under similar state laws. Thus, even as it expanded the length of minimum prison terms for gun crimes, Congress drew the line at piling that minimum on top of another higher one.

This explanation for the "except" clause is borne out by evidence that key members of Congress and Congress itself were signaling the beginning of a shift in attitude toward mandatory minimums. For example, in 1993, Senator Orrin Hatch, at that time the Ranking Republican Member of the Senate Judiciary Committee, wrote a law review article questioning the efficacy and fairness of mandatory minimums, as well as their value in deterring crime. Orrin G. Hatch, *The Role of Congress in Sentencing:*

The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185 (1993). The following year, the Federal Judicial Center published a report seriously questioning the deterrent impact that mandatory minimums had on crime. Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Fed. Jud. Ctr. 1994). Finally, in 1994, Congress created a safety valve in mandatory minimum sentencing for drug cases, allowing a sentence below the minimum if the defendant was a low-level participant with little or no criminal history, did not use a weapon, was involved in a violence-free crime, and told the government the truth about her involvement in the offense. *See* 18 U.S.C. § 3553(f) (2006). While Congress stopped short of creating a safety valve specifically for gun crimes, it nonetheless tried to strike a balance between the desire for some certainty and the unreasonable severity of multiple mandatory minimums.

The "except" clause, in other words, is best understood, along with the safety valve, as an early step in the direction of sentencing reform. It appears to reflect Congress's growing awareness that its prior hard-line approaches were not achieving the policy ends it desired. It can be read – as the plain language suggests it should be – as an effort to address some of the excessive severity that has in the years since been generally recognized as a mistake.

D. Congress Plausibly Decided Not to Achieve Marginal Penological Benefits at the Expense of Extraordinary Harm to Individuals

In the face of overwhelming evidence of the limited efficacy of high mandatory minimums, Congress could reasonably determine that the social and personal costs were too great to embrace a policy of stacking mandatory minimum sentences.

The stories of Percy Dillon and Mandy Martinson exemplify the devastating effects of multiple mandatory minimums on individuals of limited criminal culpability. At 23 years old, Dillon was convicted of drug trafficking offenses as well as a weapons violation under Section 924(c). *See* Joint Appendix at 15, 49, *Dillon* v. *United States*, No. 09-6338 (U.S. Jan. 25, 2010), *available at* 2010 WL 326557. Bound by the Sentencing Guidelines, the district court sentenced Dillon at the low end of his range to 322 months (twenty-six years, ten months), which included a sixty-month consecutive sentence for the firearms offense. *Id.* at 21, 49.

When sentencing Dillon, the judge lamented the severity of those sentences, stating, "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." *Id.* at 13, 50. In public comments made shortly after the sentencing, the judge said that he did not believe Dillon was likely to benefit from more

than five years in prison. *Id.* at 62.[6] Dillon has now completed seventeen years in prison. If his sentence had not included a 60-month firearms enhancement, he would now be serving his term of supervised release, without regard to the outcome of his case in this Court.[7]

Martinson was a 26-year-old dental hygienist with no prior criminal record and a history of drug abuse when she was convicted of assisting her live-in boyfriend with his drug-trafficking business, and of possessing the gun he had bought her for protection. *See United States* v. *Martinson*, No. 04-3018 (N.D. Iowa Feb. 20, 2005), *aff'd*, 419 F.3d 749 (8th Cir. 2005). Noting that she had been involved in selling drugs for only a brief period, that her involvement had been "due to her drug dependency," and that she had been "largely subject to [her boyfriend's] direction and control," the judge sentenced her to the "lowest possible sentence that the law will allow me to enter."

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[6] When Dillon's own case came before this Court, Justice Kennedy noted that executive clemency, the traditional fail-safe mechanism for unduly long prison terms, has been essentially unavailable in the federal system in recent years. Transcript of Oral Argument at 39, *Dillon v. United States*, No. 09-6338 (U.S. Mar. 30, 2010).

[7] In June 2008, Dillon's sentence was reduced to 22.5 years as a result of the retroactive application of the two-level reduction in the crack guidelines enacted by Congress on November 1, 2007. See S. Ct. App. 30, 31, 37-41. If the Section 924(c) enhancement had not applied to him, Dillon would have been eligible for immediate release at that time. As it is, he is not projected for release until January 2013.

Sent. Tr. at 19, 21. Even so, because of the consecutive five-year term under Section 924(c), Martinson is now serving a 15-year prison sentence.[8]

Both Dillon and Martinson exemplify the type of person who would likely have discounted the risk of mandatory-minimum sentencing, as discussed above. Dillon was a first felony offender at the time he was sent to prison for almost 27 years, and the immaturity noted by the sentencing judge undoubtedly contributed to his reckless disregard for his future. Martinson – as someone who had never even been arrested before, and who was abusing drugs and dependent on her boyfriend – would also likely have been focused on the short-term risks rather than the long-term consequences of her actions. There is no reason to believe that her behavior would have been different if she had known that accepting the gun from her boyfriend would add at least five years to any sentence she might receive for assisting his drug business. Their cases illustrate why the "except" clause was an entirely rational, if modest, reform measure, to give courts the option of exempting people like Dillon and Martinson from an additional penalty under Section 924(c).

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[8] Martinson filed a petition for commutation of sentence with the Department of Justice in May 2010.

II. THE "EXCEPT" CLAUSE REFLECTS A CONGRESSIONAL UNDERSTANDING THAT MULTIPLE MANDATORY SENTENCES ARE UNNECESSARY DUE TO THE AGE-CRIME CURVE

In 2009, more than sixteen years into his prison sentence, Percy Dillon turned forty. He is now over eighty percent less likely to commit a weapons offense than he was during his teenage years; seventy-five percent less likely than he was during his early twenties; and half as likely as he was during his years approaching thirty. But, under the Government's reading, over and above a lengthy sentence for his crack offense, he was required to serve five extra years under Section 924(c).

Consistent with empirical studies and its own previous sentencing reform efforts, Congress could have been expected to consider the age-crime curve in choosing to moderate the expansion of Section 924(c)(1)'s penalties. The "except" clause reasonably reflects Congress's desire to ensure that people like Dillon and Martinson do not remain in prison when they are well beyond the age that they are likely to pose a threat to anyone.

A. People Become Dramatically Less Likely to Commit Crimes as They Age

National arrest and population data demonstrate that people like Dillon and Martinson become significantly less prone to committing crimes as they age. In

the year 2000, for instance, FBI arrest statistics show that a person's likelihood of being arrested for a weapons offense declines by 60% between the late teenage years and the late twenties and by another 50% between the late twenties and late thirties. FBI, *Crime in the United States – 2003*, at 226 tbl.38, *available at* http://www.fbi.gov/ucr/03cius.htm; U.S. Census Bureau, Total Population by Age, Race, and Hispanic or Latino Origin for the United States: 2000, at tbl.1, http://www.census.gov/population/www/cen2000/briefs/phc-t9/index.html.

This statistical trend is known as the age-crime curve (due to the shape of its graphical depiction), and it is remarkably consistent across time, locations, crimes, and demographic subgroups. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552, 554-62 (1983). The age-crime curve is also consistent with the arrest rates of groups that have an above-average likelihood of committing crimes in general, such as recidivist offenders. *See* Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 7 tbl.8 (2002) (finding that recidivism gradually decreases with age, with prisoners released in their mid-forties being 45% less likely to be rearrested for a crime than those released in their late teenage years), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134.

B. The Age-Crime Curve Has Been Studied Extensively, and Congress Has Relied on this Research in Passing Sentencing Reforms

This strong correlation between age and crime has been studied for centuries. *See* Daniel M. Blonigen, *Explaining the Relationship Between Age and Crime: Contributions from the Developmental Literature on Personality*, 30 Clinical Psychol. Rev. 89, 90 (2010) (citing F.G.P. Neison, *Contributions to Vital Statistics* (1857); A. Quetelet, *Research on the Propensity for Crime at Different Ages* (1831)). Improved data-collection methods spawned studies that examined this correlation over large periods of time and across cultures. A predictable curve emerged, in which one's propensity for criminal actions decreased significantly after young adulthood. *See, e.g.*, Hirschi & Gottfredson, *supra*. These studies created extraordinary interest in the age-crime curve, and later scholars explored its contours, limits, and applicability to varied offenses. *See, e.g.*, Alfred Blumstein, *Violence Certainly Is the Problem – And Especially with Hand Guns*, 69 U. Colo. L. Rev. 945 (1998); David P. Farrington, *Age and Crime*, 7 Crime & Just. 189 (1986); Darrell J. Steffensmeier et al., *Age and the Distribution of Crime*, 94 Am. J. Soc. 803 (1989).

As early as the 1980s, Congress was taking account of the age-crime curve in its sentencing laws. When the Career Criminal Life Sentence Act of 1981 was originally proposed, for example, it mandated life

imprisonment for career offenders. S. 1688, 97th Cong. § 2. The bill was subsequently amended (and then enacted as the Armed Career Criminal Act) to instead impose a fifteen-year mandatory sentence. 18 U.S.C. § 924(e) (2006). This sentence reduction was based in part on "the criminal studies" that "generally show a rapid fall off in the rate of offenses committed by career criminals once they reach [the] general age range of thirty or forty years old." S. Rep. No. 566-618, at 77 (1983).

Similarly, during the floor debates over the Violent Crime Control and Law Enforcement Act of 1993, 42 U.S.C. § 13704 (2006), Senators discussed a Bureau of Justice study that demonstrated how "recidivism rates are linked ... closely with an offender's age." 139 Cong. Rec. S14974 (Nov. 4, 1993) (statement of Sen. Dorgan, referencing Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 7 tbl.8 (1989), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1135). And Congress frequently receives reports from the congressionally created U.S. Sentencing Commission on the relationship between age and crime. *See, e.g.*, U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 28 ex. 9 (2004) (finding that recidivism rates decrease with age), *available at* http://ussc.gov/publicat/Recidivism_General.pdf.

C. The "Except" Clause Is Consistent With Congressional Intent to Avoid Needlessly Incarcerating People Who Have Aged Out of Their Risk of Committing a Weapons Offense

The "except" clause is consistent with Congress's continued concern that mandatory sentences should not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

The Government's reading of the "except" clause keeps people like Dillon and Martinson in prison far beyond the age at which they could be considered dangerous. Keeping individuals in prison beyond their thirties and into their forties is associated with only an additional 1% reduction in weapons-violation rates by age group. *See* FBI, *supra*; U.S. Census Bureau, *supra*. Yet in drug cases in which people are sentenced in their mid-twenties – as were Dillon and Martinson – adding Section 924(c) sentences of five or more years on top of ten-year underlying sentences will routinely keep them incarcerated into their forties. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A) (2006) (prescribing ten-year mandatory minimum sentence for a wide variety of drug distribution crimes).

The "except" clause thus reasonably limits the application of multiple mandatory minimum sentences to protect against excessive incarceration, and preserve resources, when people have aged out of

their risk of committing a weapons violation. It is consistent with Congress's growing awareness of the futility and waste of keeping people behind bars after they are no longer dangerous.

For example, in 1995, Congress passed a mandatory minimum sentence of life in prison for persons convicted of certain felonies. *See* 18 U.S.C. § 3559 (2006). Simultaneously, Congress passed a sentence reduction provision giving the Bureau of Prisons the authority to move the sentencing court to reduce the term of persons sentenced under Section 3559 if "the defendant is at least 70 years of age, has served at least 30 years in prison . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community. . . ." 18 U.S.C. § 3582(c)(1)(A)(ii) (2006). In passing the exception, Congress implicitly recognized that any tendency toward dangerousness decreases over time, and that under such circumstances further incarceration may be unwarranted. Section 924(c) reflects and serves the same policy.

III. EVEN IF THE STATUTE WERE UNCLEAR, THE RULE OF LENITY WOULD REQUIRE PETITIONERS' READING OF THE "EXCEPT" CLAUSE

Congress thus had quite good – and certainly plausible – reasons to revise Section 924(c)(1)(A) to limit the imposition of multiple mandatory minimum

sentences, and the plain language of the statute should control. Even if this Court finds the language ambiguous, however, it should nonetheless adopt Petitioners' reading under the rule of lenity. This rule requires this Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Construction of any sentencing statute, including this one, is not properly based on an "assumption that Congress' sole objective was to increase the penalties . . . to the maximum extent possible." *Busic* v. *United States*, 446 U.S. 398, 408-09 (1980) (discussing earlier version of § 924(c)). Petitioners' position must prevail unless "the Government's position is unambiguously correct." *Granderson*, 511 U.S. at 54. In light of the plausible congressional reasons for limiting the application of multiple mandatory sentences – reasons that are based on a wealth of empirical data, literature, and congressional action – the Government's position is certainly not unambiguously correct.

CONCLUSION

The "except" clause of Section 924(c) should be read as its plain language demands: its mandatory enhancement does not apply wherever any other statute to be employed at the sentencing provides a greater mandatory minimum sentence. Congress took a step in the right direction toward sentencing reform in creating this limitation, and it had good reasons for

doing so. Even if this Court views the "except" clause as unclear, these reasons preclude finding the Government's position to be unambiguously correct.

For the foregoing reasons, as well as the reasons stated in the Briefs for Petitioners, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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KEVIN ABBOTT,

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v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Title 18 U.S.C. § 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" be sentenced to one of a number of mandatory minimum sentences, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

Does the term "any other provision of law" in Section 924(c)(1)(A) include federal drug trafficking offenses and federal firearms offenses?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice, including the correct interpretation of federal criminal statutes and the sound application of federal sentencing law. NACDL's concern for protecting the statutory and constitutional rights of federal defendants has led it to appear frequently as amicus curiae in this Court, including in the October 2009 Term in *Carachuri-Rosendo v. Holder*, No. 09-60, and *United States v. O'Brien*, No. 08-1569.

Several of the cases in which NACDL has participated, including *O'Brien*, involved the statute at issue here. *See, e.g., Dean v. United States*, 129 S. Ct. 1849 (2009) (addressing whether the higher mandatory minimum under Section 924(c)(1)(A)(iii) for discharge of firearm requires proof of intent); *Watson v. United States*, 552 U.S. 74 (2007) (holding that a person who trades a firearm for drugs does not "use" the firearm "during and in relation to . . . [a] drug trafficking crime"); *Lopez v. Gonzales*, 549 U.S. 47

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission The parties have consented to the filing of this brief.

(2006) (holding that conduct deemed a felony under state law but only a misdemeanor under federal law is not a "felony punishable under the Controlled Substances Act" pursuant to Section 924(c)(2)); *Harris v. United States*, 536 U.S. 545 (2002) (holding that "brandishing" a firearm under Section 924(c)(1)(A) is a sentencing factor, not an element of the substantive offense); *Castillo v. United States*, 530 U.S. 120 (2000) (holding that the firearm types in 18 U.S.C. § 924(c) are elements of a substantive offense, not merely sentencing factors).

STATEMENT

1. Section 924(c) of Title 18 of the United States Code makes it a federal crime to use or carry a firearm during and in relation to a federal crime of violence or drug trafficking crime, or to possess a firearm in furtherance of such a crime. The penalties are steep. Wholly apart from a potentially lengthy sentence for the underlying offense, the statute authorizes a court to imprison the defendant for the rest of his life. Also, any prison sentence for a Section 924(c) conviction must be consecutive to any other sentence that the court imposes or that any other court has already imposed. In most cases, that consecutive sentence *must* be at least five years. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A) (requiring a minimum sentence of seven or ten years if the firearm was brandished or discharged and of five years otherwise).

There is an exception to Section 924(c)'s requirement to impose one of these minimum terms of years. The mandatory minimum applies "[e]xcept to

the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). It is beyond dispute that in the two cases before the Court no greater minimum sentence was otherwise provided by "this subsection." The issue, then, is whether minimum sentences provided by 21 U.S.C. § 841 (as in petitioner Carlos Gould's case) or 18 U.S.C. § 924(e) (as in petitioner Kevin Abbott's case) fall within the category of "greater minimum sentence[s]" that are "otherwise provided by . . . . any other provision of law."

2. In No. 09-479, Kevin Abbott was convicted by a jury of two drug offenses and two firearms offenses: (1) conspiring to distribute a controlled substance, 21 U.S.C. § 846; (2) possessing more than five grams of cocaine base with intent to distribute, 21 U.S.C. § 841(a)(1) & (b)(1)(B); (3) possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c); and (4) possessing a firearm in violation of the Armed Career Criminal Act ("ACCA"), which makes it unlawful to possess a firearm after three prior convictions of violent felonies or serious drug offenses, 18 U.S.C. § 924(e). The four convictions all stemmed from the jury's finding that Abbott possessed firearms and crack cocaine that the authorities discovered in the same location.

The court imposed concurrent sentences of ten years on each of the two drug counts. As for the Section 924(c) firearms count, Abbott argued that the five-year mandatory minimum did not apply because the second firearms count—under the ACCA—otherwise provided a greater minimum sentence in

his case of fifteen years. *See* 18 U.S.C. § 924(e)(1). Section 924(c)(1)(D)(ii) still required the judge to make any sentence imposed under the Section 924(c) count run consecutively to the sentences on all other counts, but a mandatory minimum should not have restricted the judge's exercise of his sentencing authority under the Sentencing Guidelines and 18 U.S.C. § 3553(a).

The district court rejected Abbott's argument and imposed both mandatory minimums, for a total sentence of twenty years, "noting that several other courts of appeals have held that 'the plain meaning of section 924(c) clearly states that a term of imprisonment imposed under section 924(c) cannot run concurrently with any other term of imprisonment imposed for any other crime, including a sentence under [ACCA].'" No. 09-479, App. to Pet. Cert. 7a (quoting district court opinion). The Third Circuit agreed, concluding that Section 924(c)(1)(A)'s "prefatory clause" containing the exception to the listed mandatory minimums only "mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the future—in the same way, for example, that 18 U.S.C. § 924 prescribes a sentence for violations of 18 U.S.C. § 922." *Id.* at 13a.

The court of appeals rejected the Second Circuit's contrary conclusion in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), that the clause—"except to the extent . . . otherwise provided . . . by any other provision of law"—"refers to *any* offense." Pet. App. 13a-14a. The Third Circuit reasoned *inter alia* that "Congress did not intend" the type of "bizarre result"

that might follow from the Second Circuit's ruling. *Id.* at 15a. The Third Circuit explained with a hypothetical involving defendants in separate cases who brandish firearms while distributing different quantities of drugs. Focusing only on the mandatory minimums that would apply, the Third Circuit stated that "a defendant convicted of a predicate offense with a minimum sentence *one day longer* than the relevant minimum under § 924(c) would escape any further punishment while a defendant whose predicate offense carries *exactly the same* minimum sentence provided by § 924(c) sees his total sentence at least doubled." *Id.*

3. In No. 09-7073, Carlos Gould pleaded guilty to two counts of an indictment: (1) conspiracy to possess fifty grams or more of cocaine base with the intent to distribute, 21 U.S.C. § 846; and (2) possessing a firearm in furtherance of that drug trafficking crime, 18 U.S.C. § 924(c). Because the quantity of drugs in the conspiracy count triggered a statutory minimum sentence of ten years, *see* 21 U.S.C. § 841(b)(1)(A), Gould argued that the court was not required to impose the otherwise applicable minimum of five years for possession of a firearm in furtherance of the drug crime. The district court disagreed. After determining that Gould's Guideline range for the drug count was 120 – 137 months, the court sentenced him to 137 months on that count, and imposed a consecutive mandatory minimum of sixty months for the Section 924(c) conviction, for a total sentence of 197 months.

The Fifth Circuit affirmed in an unpublished opinion, relying on its earlier decision in *United States v. London*, 568 F.3d 553 (5th Cir. 2009).

SUMMARY OF ARGUMENT

1. Although a sentence of imprisonment under Section 924(c) may not run concurrently with "any other term of imprisonment"—a phrase that this Court interpreted as broadly as possible because of the choice of the word "any," *see United States v. Gonzales*, 520 U.S. 1, 5 (1997)—Congress enacted an exception to the statute's mandatory minimum provisions that applies under two circumstances. In particular, Section 924(c)(1)(A) directs a court to impose the specified minimum, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The scope of the circumstances for applying the statutory exception, when considered in context, is clear. First, to determine whether "this subsection" "otherwise provide[s]" for "a greater minimum sentence," a court looks to the rest of subsection (c) where, for example, Congress provided a greater minimum sentence of thirty years for defendants who possess a machinegun. *See, e.g.*, 18 U.S.C. § 924(c)(1)(B)(ii). In applying the second part of the exception, the court looks *beyond* Section 924(c) to "any *other* provision of law" that "*otherwise* provide[s]" a minimum sentence greater than those found in Section 924(c)(1)(A). Congress chose "any"—the most expansive word it could have used

for this situation—and it added no qualifiers to the quoted phrase.

When Congress adopted the "except" clause, the only "other provision[s] of law" on the books that could "otherwise provide[]" an additional "greater minimum sentence" in any case were statutes that criminalize conduct *beyond* that already proscribed in subsection (c)(1). The most commonly employed of those other provisions are found in the Controlled Substances Act ("CSA") and the ACCA, each of which defined in 1998 (and continue to define today) related federal offenses that prosecutors routinely charge in tandem with one or more Section 924(c) counts.

Thus, under the straightforward wording of Section 924(c)(1)(A)'s "except" clause, read in proper context, the "greater minimum sentence" "provided" by the CSA and ACCA in cases such as Gould's or Abbott's is the minimum that applies in lieu of the minimum in Section 924(c)(1)(A).

The government would have this Court alter the operation of the statute by reading "any" other provision of law to mean a contrived category of *hypothetical* provisions of law that Congress *might* some day enact—a set of statutes that today, as in 1998, numbers exactly zero. In the government's view, "any other provision of law" must be understood to refer *only* to "those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A)." Petition for a Writ of Certiorari at 11, *United States v. Williams*, No. 09-466 (U.S. 2009) ("*Williams* Pet."). "[A]ny other provision

of law" thus becomes a null set, because the government readily concedes that *no* other provision of law calls for two or more minimum sentences for the same Section 924(c) violation.

The government resorts to pure, untenable conjecture in an effort to avoid the consequences of its position. It assumes that Congress might have decided to add this second, broader exception to guard against the possibility that a future Congress might decide to enact a new law that imposes higher minimum penalties for conduct [1] that is identical in every detail to the conduct already proscribed by Section 924(c)(1)(A), but [2] is somehow codified in some other, remote statutory provision far away from Section 924(c) or even Title 18, [3] just in case the putative future Congress enacting such an identical penalty provision somehow fails to realize that punishments for this particular conduct already are codified in Section 924(c) and inadvertently adds to the penalties elsewhere. Even putting aside the manifest implausibility of the government's reasoning, or the fact that its adoption would render half of the exception wholly superfluous, the government has proffered no evidence from any legislative record suggesting that such a counterintuitive chain of contingencies was even remotely contemplated by the 1998 Congress.

Lastly, the very best that can be said for the government's position is that Section 924(c)(1)(A) arguably is ambiguous with respect to which precise conduct the "other" sentence must be "provided" for. Yet to claim that a provision might be ambiguous does not render all possible interpretations equally plau-

sible. The government not only insists on the *least* plausible interpretation that might conceivably be articulated—to the exclusion of other interpretations more faithful not only to the text of the statute but to traditional canons of construction—but wholly disregards the rule of lenity.

2. Honoring the statute's straightforward meaning does not lead to the types of undesirable sentencing outcomes of which the government warns. The mandatory minimums at issue in cases such as these set a *floor* for the total sentence. The sentencing judge must also calculate the applicable Sentencing Guidelines and consider each of the seven principal sentencing factors (and various subsidiary factors) in the Sentencing Reform Act before arriving at a total sentence that will be sufficient, but not greater than necessary, to comply with the sentencing purposes that Congress identified. *See* 18 U.S.C. § 3553(a).

From the time Congress added the "except" clause to the present, when judges continue to sentence under the advisory regime remaining in place five years after this Court decided *United States v. Booker*, 543 U.S. 220 (2005), Congress has given judges the tools to calibrate a defendant's total sentence and avoid unwarranted disparity. The government's interpretation, on the other hand, would replace the precision available under Section 3553(a) with the inflexibility of a second mandatory minimum term. The Court need not take the extreme step of disregarding the plain text of the statute, especially where a ruling faithful to that text will better promote Congress's sentencing objectives in federal criminal cases.

ARGUMENT

I. UNDER THE EXPRESS STATUTORY LANGUAGE, THE MINIMUM CONSECUTIVE IMPRISONMENT TERMS SPECIFIED IN SECTION 924(C)(1)(A) DO NOT APPLY WHERE A COURT SENTENCES THE DEFENDANT TO A GREATER MINIMUM SENTENCE UNDER ANOTHER FEDERAL STATUTE.

The language of the "except" clause in 18 U.S.C. § 924(c)(1)(A) is straightforward. The clause applies whenever a greater minimum sentence "is otherwise provided" by the relevant portion of Section 924(c)(1) or by "any other provision of law." In the cases before the Court, greater minimums were provided by two drug and firearm statutes that together account for the lion's share of mandatory minimum sentences in federal cases and that prosecutors almost invariably charge in tandem with Section 924(c) counts. The government's contrary interpretation of the exception to disregard these two sources of greater minimum sentences violates two cardinal rules of statutory construction by adding words of limitation to the statute, and by giving the subsection's key phrase—"any other provision of law"—no rational purpose.

A. Section 924(c)(1)(A)'s "Except" Clause Is Not Confined To Other Provisions Of Law That Set Penalties For The Precise Conduct That Violates Section 924(c)(1)(A).

1. Section 924 of Title 18, entitled "Penalties," specifies prison terms and fines for violations of several federal firearms provisions. Section 924(c), in particular, lists the penalties—including the applicable minimum prison terms—for using, carrying, or possessing a firearm during and in relation to a

crime of violence or a drug trafficking crime. Depending on the firearm type, whether the firearm was more than simply possessed, and the defendant's history of similar violations, mandatory minimum sentences specified in this subsection range from five years to life imprisonment. Section 924(c)(1)(A) directs the sentencing court to impose one of these consecutive mandatory minimum sentences—the lowest being a five-year mandatory minimum for possession of a firearm—"[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection *or by any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added).

By the plain wording of the "except" clause there are two separate circumstances in which a greater minimum sentence applies in place of the minimum in Section 924(c)(1)(A). First, the clause directs a court not to impose Section 924(c)(1)(A)'s mandatory minimum term where "a greater minimum sentence is otherwise provided by this subsection." For example, a ten-year minimum would be imposed if the firearm was "a short-barreled rifle" (§ 924(c)(1)(B)(i)) instead of the five-year minimum that applies for "possess[ing]" any firearm (§ 924(c)(1)(A)(i)). Second, the "except" clause overrides the mandatory minimum provided in Section 924(c)(1)(A) where "a greater minimum sentence is otherwise provided . . . by any other provision of law."

Relevant to the "except" clause's second circumstance, the federal drug statutes and the ACCA are "other provisions" that "provide[]" for a "minimum sentence" that is often "greater" than the lowest minimum specified in Section 924(c)(1)(A). The two cases before the Court turn on whether Congress, in this second circumstance, unambiguously excluded

these greater minimum sentences from the broad phrase "greater minimum sentence . . . otherwise provided . . . by any other provision of law."

2. "[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that the Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

Petitioners demonstrate that Congress chose expansive language, which the government has successfully urged this Court to interpret broadly where used within the very same subsection. *See* Brief for Petitioner at 13-14, 16, *Abbott v. United States*, No. 09-479; Brief for Petitioner at 11-13, *Gould v. United States*, No. 09-7073. Of course, as petitioners have further explained, no statutory phrase should be considered in strict isolation from "the neighboring words with which it is associated." *See, e.g.*, *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). The issue, then, is what sources of greater minimum sentences Congress indicated that it was including when it created a penalty override for each greater minimum that "is otherwise provided by this subsection or by any other provision of law."

The context in which the quoted language appears demonstrates that the two most likely sources of greater minimum sentences are the CSA and the ACCA. Of the dozens of mandatory minimum provisions then on the books, only a handful allowed for a

mandatory minimum that could trigger the "except" clause—*i.e.*, one greater than five years. Of that limited universe, these two statutes were far and away the most frequently employed by federal prosecutors. U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 37-38 (1991). Based on the type of conduct that these two statutes penalize—drug trafficking and firearms possession—it is common for one or both to be charged alongside one or more Section 924(c) counts.

It was plain at the time Congress added the "except" clause that these two statutes and Section 924(c) were heavily intertwined. A defendant who uses, carries, or possesses a firearm while engaging in drug trafficking or a crime of violence will be subject to the ACCA's fifteen-year minimum if he has the requisite prior convictions for those types of conduct (drug trafficking or violent felonies) that serve as the only predicates for a Section 924(c) charge. And the CSA is the most commonly charged federal statute that can serve as one of the two predicates. So routine are indictments containing both CSA and Section 924(c) charges that Section 924(c) itself expressly contemplates and addresses how to impose multiple penalties in such a case. 18 U.S.C. § 924(c)(1)(D)(ii) (specifying that a term of imprisonment may not run concurrently with other terms of imprisonment "including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried or possessed").

Congress knew, based on the degree to which these statutes overlap, that of the totality of greater mandatory minimum penalties that the law might

provide when a defendant is being sentenced for possessing a firearm during and in relation to a drug trafficking offense or crime of violence, the vast majority would be for either the drug trafficking that serves as a Section 924(c) predicate or the aggravating circumstance that the defendant possessed the firearm after already being convicted of conduct that itself serves as a Section 924(c) predicate.

3. The government and some courts of appeals, however, narrowly construe "any other provision of law," proposing to create restrictions and qualifiers that Congress did not choose. In departing from the approach taken by the Second and Sixth Circuits,[2] these courts have read "any" other provision of law to mean only "some" other provisions of law.[3]

The difficulty with these various positions is well illustrated by the degree to which the courts and the government have been unable to agree on what the "except" clause means if it does not apply to greater minimum sentences provided by other counts of conviction. Some courts have rewritten the "except" clause to require imposition of a mandatory mini-

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[2] *See United States v. Almany*, 598 F.3d 238 (6th Cir. 2010); *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009); *Whitley*, 529 F.3d at 150.

[3] *See London*, 568 F.3d at 564 (adopting and giving precedential effect to *United States v. Collins*, 205 Fed. Appx. 196 (5th Cir. 2006)); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1281 (2010); *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1688 (2009); *United States v. Studifin*, 240 F.3d 415, 423-24 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 386 (8th Cir. 2001).

mum found in Section 924(c)(1)(A), except to the extent a greater minimum sentence is otherwise provided by subsection (c) or by another provision of law that punishes firearm-related conduct. *See, e.g.*, *Alaniz*, 235 F.3d at 389 (holding that the "except" clause applies "to the *firearm-related conduct* proscribed either by 924(c)(1) or 'by any other provision of law'" (emphasis added)). Under this view, the ACCA would be included in "any other provision of law," but statutes such as the CSA would not be included, even when used to charge the same drug offense that serves as the predicate for the Section 924(c) violation.

Other circuits have decided to limit the reach of the "except" clause even more, reading "any other provision of law" to mean those other provisions that apply to the same subset of firearm-related conduct already made unlawful by Section 924(c)(1) itself. *See, e.g.*, *Studifin*, 240 F.3d at 423. The government takes this more extreme view, arguing that the other provision of law must "establish penalties for violating Section 924(c)(1)(A)," "[j]ust as the phrase 'this subsection' refers to provisions that prescribe minimum sentences for the Section 924(c) offense." *Williams* Pet. 12. In other words, the phrase "any other provision of law" was designed for other statutes that create new penalties for violations of Section 924(c)(1)(A) *itself*. *Id.* at 13 n.3 (example of hypothetical amendment to Section 922(k) that provides: "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years").

None of these approaches can be squared with the statute as Congress amended it in 1998. The gov-

ernment, undeterred, claims that the relevant words ("is otherwise provided . . . by any other provision of law"), read literally, would require a judge to consider mandatory minimums for "charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing." *Williams* Pet. 13. But a straightforward reading of the exception could not require a judge to take account of the potential sentence for a count that simply is not before the court because the sentence has not even been imposed in the other jurisdiction. The "except" clause, after all, addresses the sentencing phase—not the definition of an offense—and under no fair reading of this statute could it be said that a sentence unavailable to the sentencing court "is otherwise provided" in *that* case by some other provision of law.[4] Thus, the text of the clause need not be artificially restricted in order to avoid the prospect of a court considering mandatory minimums that the court has no authority to apply.[5]

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[4] The government's reference to the relationship between a Section 924(c) sentence and a sentence for charges pending elsewhere is a red herring. No matter which interpretation of the "except" clause prevails, separate federal or state laws that govern sentencing administration in the jurisdiction where the *pending* charge later is sentenced will answer the question whether two consecutive mandatory minimums are imposed. *See, e.g.*, 18 U.S.C. §§ 3584, 3621 *et seq.*

[5] The government's concern about "entirely unrelated counts" likewise presents no reason to resort to an overly restrictive view of the statute. Even today, statutes that could theoretically produce an unrelated count of conviction in a Section 924(c) case routinely provide for minimums of no more than five years and therefore would not trigger the "except" clause. *Compare* U.S. Sentencing Comm'n, *Overview of Statutory Man-*

[Footnote continued on next page]

B. An Interpretation That Limits The Application Of § 924(c)(1)(A) To "Some" Other Provisions Of Law Violates Cardinal Rules Of Statutory Construction.

The government's view—interpreting "any other provision of law" to mean only those other provisions of law that provide mandatory minimum sentences for conduct proscribed by Section 924(c) itself—should be rejected because it violates two cardinal rules of statutory construction. Not only would the government's position render the second exception in the "except" clause superfluous, it would force into the statute words that Congress did not include.

1. As noted above, the government would limit "any other provision of law" to those provisions elsewhere in the United States Code that set a different and higher additional sentence for the Section 924(c) conviction *itself*. *Williams* Pet. 11 (reading the statute to mean *inter alia* that a defendant "is subject to a mandatory consecutive five-year sentence . . . *ex-*

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datory Minimum Sentencing App. B (2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf (listing the number of convictions in FY 2008 under each of various mandatory minimum statutes), *with, e.g.*, 8 U.S.C. § 1324(a)(2)(B) (minimums of three and five years for certain recidivist immigration offenses), *and* 18 U.S.C. § 1028A (minimums of two and five years for certain aggravated identity theft). The drug trafficking and firearms possession statutes that produce related counts of conviction account for almost all minimum sentences that could come into play under the "except" clause. *See Overview of Statutory Mandatory Minimum Sentencing, supra*, at App. B (showing number of mandatory minimum sentences imposed for each statute).

cept that if another feature of the Section 924(c) offense triggers a greater mandatory minimum penalty for that crime under 'any other provision of law,' the defendant is instead subject to that higher sentence on the Section 924(c) count"). But the government concedes the complete "absence of any provision of law outside Section 924(c) that currently prescribes such penalties." *Id.* at 12.[6]

The government therefore proposes to render the words "any other provision of law" superfluous. Doing so would violate a "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that courts should "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Because from the time Congress enacted the "except" clause to the present, no federal statute other than Section 924(c) itself has prescribed an additional minimum sentence for violating Section 924(c), the *first* part of the "except" clause—reaching cases where "a greater minimum sentence is otherwise provided by this subsection"—already fully serves the purpose that the government would attribute to the *second* part of the clause. To adopt the government's reading is to accept that *not a single case* prosecuted under Section 924(c) since the "except" clause was added would have come out differently had Congress omitted the words "or by any other provision of law."

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[6] So narrow is the government's interpretation, it would allow a second consecutive minimum sentence for an offense that contains each *element* of a Section 924(c) violation but fails to make express *reference to* that subsection.

2. In an effort to evade the duty to give effect whenever possible to every word and clause of a statute, the government invents a *conditional* purpose for the language. The government theorizes that the language would operate as a "safety valve" guarding against consecutive sentences in the event a future Congress were to decide to enact a new statute setting new and higher penalties for violating Section 924(c)(1). That theory, untethered to anything resembling reality, is preposterous.

The government's premise is that Congress was looking to the future and "simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Studifin*, 240 F.3d at 423 (theorizing that the extra language "any other provision of law" was meant to "reserv[e] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation"); *accord United States v. Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) (citing for support of this proposition *Collins*, 205 Fed. Appx. at 197-98, which cites *Studifin*, 240 F.3d at 423), *cert. granted*, 130 S. Ct. 1284 (2010)); *London*, 568 F.3d at 564 (adopting *Collins*, 205 Fed. Appx. at 196). Even were legislative history needed to understand the plain reach of this statute, which it decidedly is not, nothing in that record suggests, much less establishes, that Congress had anything like this even remotely in mind.

No doubt the blank record is explained by the fact that the government has built its theory on multiple unsupportable assumptions about what Congress anticipated and intended in 1998 when it included the separate words "or by any other provision of law" in

its amendment of Section 924(c)(1). At a minimum, the Court would need to assume that the 1998 Congress anticipated: (i) that *another* Congress might someday decide to enact a separate penalties law governing conduct already proscribed in Section 924(c), which itself is located in the statute devoted to firearms "Penalties"; (ii) that this new law would add mandatory minimum sentences for Section 924(c) violations even though the 1998 Congress had restructured Section 924(c)(1) for the express purpose of allowing new minimum sentences to be added; (iii) that the new minimums would exceed (yet not replace) the current mandatory minimums; and (iv) that those drafting the future statute would not understand the need to account for the interaction between the putative provision and the one already in existence (which the government used nearly 1,500 times in 1998[7] and which produced nearly 2,500 convictions in 2008[8]).

Not only is the legislative record devoid of even a suggestion that Congress entertained these far-fetched assumptions, had the drafters given even a moment's thought to such a fanciful concern they would have soon recognized that no extra language would be needed to address it. It has long been the rule under the Double Jeopardy Clause of the Fifth Amendment that "in the absence of a clear indication

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[7] Bureau of Justice Statistics, Federal Justice Statistics Resource Program, Number of Defendants Charged Under 18 U.S.C. § 924(c), FY 1998, http://fjsrc.urban.org.

[8] *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* Table 17 n.3. (2008), *available at* http://www.ussc.gov/annrpt/2008/SBtoc08.htm.

of contrary legislative intent," "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments." *Whalen v. United States*, 445 U.S. 684, 692 (1980). The test "to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Thus, if Congress ever added another provision to the United States Code providing a greater minimum sentence for a violation of Section 924(c)—such as the government's hypothetical statute punishing Section 924(c) offenses that involve firearms with defaced serial numbers, *Williams* Pet. 13 n.3—only one of the two penalties would apply because Section 924(c) would be a lesser included offense of the one in the new statute. The Court reaffirmed that rule in *Rutledge v. United States*, 517 U.S. 292 (1996), just two years before Congress created the "except" clause. *Id.* at 297 ("For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in *Blockburger*," and "have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").[9]

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[9] Neither the government nor the courts of appeals have located any statute on the books in 1998 that would have prompted Congress to put special language in Section 924(c) as a way to prevent *additional* (rather than *alternative*) penalties for two violations (either identical violations or a lesser included within the greater violation) of the same statute. *Cf.* 18 U.S.C. § 3559(c)(1) & (7) (setting a life sentence "[n]otwithstanding any other provision of law" for conviction of a "se-

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Of course, a future Congress could always override the *Blockburger* rule by clearly stating in the new statute that the greater punishment is cumulative, but that would not explain the decision to add the words "or by any other provision of law" in *this* statute. That is because if a later Congress does decide that the punishments should be separate and cumulative, *that* determination will control no matter how the law was worded in 1998.

3. Not only does the government's rendition give the second part of the "except" clause no purpose, it would require the Court to insert into the statute language that Congress did not decide to include. This Court has routinely resisted calls "to insert words that are not now in the statute." *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968). The reason is grounded firmly in the respective roles of the co-equal branches. To add new words "would, to some extent, substitute the judicial for the legislative department of the government. . . .

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rious violent felony" under the "three strikes" statute, and providing that the defendant "shall be resentenced to any sentence that was available at the time of the original sentencing" if either of the two predicate convictions is later overturned). Simply put, Congress knew in 1998, as it surely knows today, that the easy and expedient way to prevent one statute from imposing cumulative penalties for a single violation of another statute is to place appropriate language (such as "notwithstanding any other provision of law") in the statute containing the higher penalty, rather than guess how future statutes might be worded and then seek preemptively to alter the effect of the predicted wording.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

Congress did not limit the "except" clause to greater minimum sentences "otherwise provided by this subsection or by any other provision of law penalizing violations of this subsection." It more broadly worded the exception to cover greater minimum penalties provided by "any other provision of law," a term that at the time—and to this day—most notably includes the greater minimums under the ACCA and the CSA. Congress was careful to qualify the description of a provision of law in Section 924(c) when it wanted to limit the statute's scope. *See* § 924(c)(1)(A) (limiting "any crime of violence or drug trafficking crime" to those "for which the person may be prosecuted in a court of the United States"); *cf. Gonzales*, 520 U.S. at 5 (interpreting "any other term of imprisonment" to include state prison terms because "Congress did not add any language limiting the breadth" of that language). The "except" clause should be enforced consistent with the language Congress enacted rather than the language the government would have preferred.

C. An Interpretation That Limits The "Except" Clause To Only Some Other Provisions Of Law Violates The Rule Of Lenity.

Although the "except" clause, read in context, is clear, to the extent ambiguity arises from the government's proposed interpretation, the rule of lenity requires that the Court construe such ambiguity in favor of the defendant. *Moskal v. United States*, 498 U.S. 103, 107-08 (1990); *Bifulco v. United States*, 447

U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980).

The rule of lenity protects two core values at issue here. Under fundamental notions of due process, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "To make the warning fair, so far as possible the line should be clear." *Id.* Second, "legislators and not the courts should define criminal activity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). Protecting the line between the co-equal branches helps ensure that no citizen is "subjected to punishment that is not clearly prescribed" and it "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.).

This principle of statutory construction applies equally to the substance of criminal prohibitions and the penalties imposed for violations of them. *See Bifulco*, 447 U.S. at 387 (citing cases). Thus, even assuming the government can succeed in injecting ambiguity where none exists, lenity requires resolving it against the government, because when a statutory term is unclear, courts "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 347-48 (1971)); *see also Whalen*, 445 U.S. at 693-94 (resolving ambiguity regarding the authorization of consecutive sentences in favor of lenity).

II. GIVING § 924(C)(1)(A) ITS PLAIN AND STRAIGHTFORWARD MEANING WOULD AUTHORIZE COURTS TO IMPOSE SENTENCES SUFFICIENT, BUT NOT GREATER THAN NECESSARY, TO ACHIEVE THE PURPOSES OF PUNISHMENT.

1. The government nonetheless alludes to the rare exception in which courts will disregard a statute's plain meaning based on the results such a reading would produce. *Williams* Pet. 16, 17 (referring variously to the available sentences in certain Section 924(c) cases as "illogical," "anomalous," and "bizarre"). But this interpretive tool has no role to play under a statutory scheme that, after requiring imposition of the greatest minimum sentence, reserves to the sentencing court its traditional power to impose a *total* sentence properly calibrated to the defendant's level of culpability and dangerousness. The straightforward interpretation of Section 924(c) in no way requires a judge to give a lower sentence (or even the same sentence) to the more culpable or dangerous of two defendants.

As an initial matter, the bar is a fair bit higher than the government suggests. This Court does not override the wording of a statute simply because the occasional application would be anomalous, illogical, or even bizarre. Rather, the reading of the statute must produce an "absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted).

The government cannot even meet its own proposed test. A mandatory minimum sentence is, quite simply, nothing more than a minimum. It is a lower limit on the judge's discretion, just as a statutory maximum acts as an upper limit. Under 18 U.S.C.

§ 3553(a), a judge considers numerous factors—including the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense—in deciding how far above the minimum a defendant's sentence should be. Only by ignoring the overall context in which a mandatory minimum provision operates could the government contend that illogical outcomes are likely to flow from reading the statute to mean what it says.

Not only are the mandatory minimum sentences in a Section 924(c) case the starting point in a judge's determination of the appropriate sentence, the Section 924(c) count almost always is included with at least one other count carrying a lengthy maximum prison term. That is due, in no small part, to the fact that a violation of Section 924(c) does not occur unless the defendant uses, carries, or possesses a firearm during and in relation to another federal offense—either a crime of violence or a drug trafficking crime. The drug trafficking statute, for example, contains several maximum terms, depending on the quantity of drugs and the defendant's prior record. Aside from cases involving small quantities of marihuana, the shortest maximum is ten years. *See* 21 U.S.C. § 841(b).

2. The Sentencing Commission has drafted the Guidelines to account for the effect a Section 924(c) conviction can have on the total sentence, and the objective of those provisions is to avoid unwarranted disparity. For example, the drug trafficking Guideline contains a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2009) ("U.S.S.G."). But if the defendant also re-

ceives a mandatory minimum sentence under Section 924(c) for using or carrying a firearm during and in relation to the drug trafficking crime, the Guidelines instruct the court not to apply the Guidelines enhancement. *See id.* § 2K2.4 cmt. n.4. Thus, a defendant in criminal history category III who carries a gun while distributing four kilograms of cocaine would have a Guideline range of 121 – 151 months with a Section 924(c) conviction, and a range of 151 – 188 months without one. With a five-year mandatory minimum under Section 924(c)(1)(A)(i) the effective range for that defendant would be 181 – 211 months. Because the drug trafficking crime carries a maximum sentence of forty years (or a maximum of life if the defendant has a prior drug trafficking conviction), the court would have ample latitude to impose a sentence—through a departure from the Guidelines or, if needed, as a variance—that achieves the purposes of sentencing.[10]

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[10] The statute does not bar a judge from imposing a consecutive sentence of imprisonment under Section 924(c) even if the "except" clause applies. The simple difference in such cases is that the sentence imposed under Section 924(c) need not be any particular minimum length. A number of other federal criminal statutes also require mandatory consecutive sentences without a required minimum term. *See, e.g.*, 18 U.S.C. § 924(a)(4) (requiring consecutive sentence, but with no minimum, for possessing firearms in a school zone); 18 U.S.C. § 3146(b)(1)-(2) (same for failure to appear in court or for service of sentence); 21 U.S.C. § 865 (same for smuggling certain controlled substances while participating in a program for facilitated entry into the country). Moreover, the Sentencing Commission is experienced in drafting Guidelines to account for such statutes. *See, e.g.*, U.S.S.G. §§ 2J1.6 cmt. n.3 (failure to appear); 3C1.3 cmt. n.1 (offense while on release).

The Commission expressly contemplated and addressed the unusual case where, even under the government's interpretation, a conviction under Section 924(c) might cause a lower overall sentence than would be the case without the conviction. U.S.S.G. § 2K2.4 cmt. n.4. The Guidelines state that "[i]n such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment." *Id.* Just as the Commission has expressly provided for adjustments that address this type of anomaly under the mandatory minimums in Section 924(c), nothing prevents a judge from exceeding the Guidelines range in the unusual case where a defendant faces a lower mandatory minimum sentence by operation of the statute and a higher sentence is needed to serve the purposes of sentencing under Section 3553(a).

In fact, a judge would not even need to depart or use a variance to avoid the supposed problem asserted by the government, because the Guidelines already address it. The government argued in *Williams* that a defendant who distributes five kilograms of cocaine and brandishes a firearm would only be subject to a ten-year minimum, *see* 21 U.S.C. § 841(b)(1)(A), while a defendant who distributes 500 grams of cocaine and brandishes a firearm would face a combined minimum of twelve years, *see* 21 U.S.C. § 841(b)(1)(B) (five-year minimum); 18 U.S.C. § 924(c)(1)(A)(ii) (seven-year minimum). *See Williams* Pet. 16-17. But the government quits its analysis at the first step of a multi-step sentencing process. Under the Guidelines the defendant delivering the larger quantity of drugs faces a Guidelines range higher than the total sentence range (including the mandatory minimum) applicable to the de-

fendant who distributed the smaller quantity.[11] And the range is higher still if the more culpable defendant has a prior record.

The "except" clause does not distort sentencing outcomes, because the Guidelines, along with the other Section 3553(a) sentencing factors, help guide judges as they seek an appropriate sentencing result. Even before *Booker*, judges could depart from the applicable Guidelines to avoid absurd—and even "bizarre"—outcomes. 543 U.S. at 234 (noting that the Guidelines as mandatory permitted departures to account for circumstances not adequately considered by the Sentencing Commission); *Koon v. United States*, 518 U.S. 81, 92-96 (1996) (recognizing that the Guidelines vest discretion in sentencing courts to depart from the applicable sentence range to account for factors not expressly contemplated by the Guidelines); *see, e.g.*, *United States v. Pool*, 937 F.2d 1528, 1534 (10th Cir. 1991) ("To permit appropriate sentencing under anomalous circumstances, the Guidelines allow the trial court to depart upward or downward from the Guidelines as the situation dictates. The degree of departure is within the sound discretion of the sentencing court."). Section 3553(a), as applied after *Booker*, gives judges even greater power to ensure that a sentence is sufficient, but not greater than necessary, to achieve the purposes of sentencing. A judge who has the power to "avoid unwarranted sentencing disparities," § 3553(a)(6),

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[11] Five kilograms of cocaine and possession of a firearm yields an offense level of thirty-four and a range of 151 – 181 months (twelve years, seven months to fifteen years, one month). U.S.S.G. § 2D1.1(b)(1) & (c)(4) (2009).

and to tailor the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A), is fully capable of applying Section 924(c) in a manner that is both consistent with Congress's purpose and true to the language of the statute that Congress enacted.[12]

3. The government's interpretation, if adopted, would hamper the ability of judges to accomplish the statutory purposes of sentencing. The Sentencing Commission itself noted in its comprehensive review of such penalties that "lack of uniform application" of mandatory minimums by the government "creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*,

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[12] This power, which Congress trusts judges to exercise when determining the appropriate punishment for a vast array of serious federal crimes, fully answers the assertion that the 1998 Congress must have been on a single-purpose mission to double up the use of mandatory minimums in cases where two mandatory minimums could be triggered. As an initial matter, it is at least equally likely that when adding to substantial mandatory minimum terms capable of putting a person behind bars for much of the rest of his life, Congress saw little marginal utility in funding another five years of prison at the end of such a term. And it is much more likely that Congress chose to rely on judges to make that determination based on the age of a defendant, the total sentence that will apply on all of the counts in the case, and other important case-specific factors for which Section 924(c)'s mandatory minimum provision does not account.

at ii-iii. The Commission has long noted that "disparate application" of mandatory minimums "appears to be related to the race of the defendant" and "to the circuit in which the defendant happens to be sentenced." *Id.* at iii (noting that mandatory minimums, in contrast to Sentencing Guidelines, "are wholly dependent upon defendants being charged and convicted of the specified offense under the mandatory minimum statute," that "the power to determine the charge of conviction rests exclusively with the prosecution" for cases that do not go to trial, and that, as a result, "mandatory minimums transfer sentencing power from the court to the prosecution"); *see also* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) (in 1995 "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those convicted under it," and data from 2000 "showed the same pattern of disproportionate overrepresentation of Blacks among qualified offenders who actually received the statutory enhancement").

Wholly apart from the disparity in how the government chooses to invoke mandatory minimums, it appears that "an unintended effect of mandatory minimums is *unwarranted* sentencing uniformity" in which "offenders seemingly not similar nonetheless receive similar sentences." *Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iii. The reason is simple: "[T]he structure of the federal sentencing guidelines differentiates defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is meant to provide just punishment and proportional sentences," while "the structure of man-

datory minimums lacks these distinguishing characteristics." *Id.* "Whereas guidelines seek a smooth continuum, mandatory minimums result in 'cliffs'" that "compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act." *Id.* at iv.

The mandatory minimum feature of Section 924(c), as amended, still takes account of only a small number of differences between offenses and offenders (*i.e.*, type of firearm, whether it was used or displayed in a particular way, and the defendant's previous convictions for similar conduct). It is a far cry from the "system of finely calibrated sentences" that Congress intended when it created the Sentencing Guidelines. *See Mandatory Minimum Penalties in the Federal Criminal Justice System*, *supra*, at iv. Nor did Congress give any indication that the 1998 amendment was intended to compound the disparity and the lack of proportionality that characterizes mandatory minimums where another statute *already* provides for a greater minimum sentence, often for substantially overlapping conduct.

4. The "except" clause properly affords district courts the latitude to determine the appropriate length of a sentence that will *always* be *in addition to* a mandatory minimum greater than five years. These two cases are illustrative. Gould was subject to a mandatory minimum under the CSA of ten years. The district court had the statutory authority to sentence him to a maximum of life imprisonment on that count alone. Abbott received a fifteen-year sentence under the ACCA. That statute, according to the Court, allows for a maximum term of life imprisonment wholly apart from any consecutive sentence under Section 924(c). *Custis v. United States*,

511 U.S. 485, 487 (1994). In both cases, the sentencing judge followed the government's interpretation of Section 924(c)(1)(A) and imposed mandatory minimum terms of five years consecutive to the lengthy sentences on the other counts. Under a proper reading of the statute, the length of any additional sentences beyond the applicable minimum would have been governed by Section 3553(a), which requires the judge to consider all of the statutory purposes of sentencing and apply them to the facts of a particular case.

The "except" clause does not guarantee defendants shorter sentences. It merely affords the sentencing court appropriate discretion—the type of discretion exercised by federal judges every day in every sentencing hearing that is governed by Section 3553(a). A proper reading of Section 924(c)(1)(A) will not force judges to follow some unfamiliar standard, nor will it inject uncertainty or complexity into the sentencing process. Instead, it will be faithful to Congress's command that when a greater mandatory minimum is already provided by law, the length of the additional sentence should be guided in part by the considered judgment of the Sentencing Commission, which this Court notes has "examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate," *Rita v. United States*, 551 U.S. 338, 349 (2007), and that the sentence ultimately imposed be "sufficient, but not greater than necessary, to comply with the purposes" of any federal sentence. 18 U.S.C. § 3553(a).

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for a proper application of Section 924(c)(1).

Respectfully submitted.

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